TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1955

No. 150

W. A. SHIELDS, PETITIONER,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 14, 1955

CERTIORARI GRANTED OCTOBER 10, 1955

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CAPTION.

BE IT REMEMBERED that at a regular term of the United States District Court, in and for the Northern Division of the Middle District of Alabama, the Honorable Charles B. Kennamer, United States District Judge for the Middle District of Alabama, Presiding, and holding its session at Montgomery, Alabama, which said term began on the 5th day of May, 1953, and continued from time to time thereafter, up to and including the 26th day of February, 1954, there came on to be heard and determined, among other causes pending on the docket, while Court was regularly in session, the following cause:

W. A. SHIELDS,

Plaintiff,

versus

ATLANTIC COAST LINE RAILROAD COMPANY, A Corporation, and SOUTHERN RAILWAY COMPANY, A Corporation,

Defendants.

Civil Action No. 896-N.

Appearances:

Messrs. Godbold & Hobbs, 306-311 Professional Center, Montgomery, Alabama, Attorneys for Plaintiff, Appellee and Cross Appellant.

Messrs. Evans Hinson and D. N. Hamilton, 26 South Perry St., Montgomery, Alabama Attorneys for Defendant and Appellant, Atlantic Coast Line Railroad Company.

Messrs. Pettus, Fuller, Reeves & Stewart, Selma, Alabama, Messrs. Rushton, Stakely & Johnston, Bell Building, Montgomery, Alabama, Attorneys for Defendant and Appellee, Southern Railroad Company.

The State of Alabama,
Montgomery County.
In the Circuit Court of Montgomery County, Term, 19.

W. A. Shields, Plaintiff,
vs.
Atlantic Coast Line R.R. Co., A Corp., M. Hugh Stuart and Edgar W. Stuart, d b a Tan-Kar Oil Co., A.B.C. Company, a corporation, Defendant.

The plaintiff claims of the Defendant:

Count 1.

Plaintiff claims of the defendants the sum of Twenty-Five Thousand ($25,000) Dollars as damages for that, heretofore on, to-wit, May 6th, 1952, the defendant, Atlantic Coast Line Railroad Company was engaged in business as a common carrier and as such was engaged in the business of transporting oil and gasoline for hire and interstate commerce and in connection therewith did operate a train and place a tank car on a siding for unloading purposes, said siding being located, to-wit, at the North end of Tallapoosa Street in the City and County of Mont-

gomery, Alabama; and plaintiff avers that on said date the said Tan-Kar Oil Company was engaged in the business of buying and selling oil and gas and as an incident to such a business did order the said defendant Atlantic Coast Line Railroad Company to place tank cars at the siding above described for the purposes of unloading oil and gasoline from said tank cars. On said date the plaintiff had entered into a contract for a valuable consideration with the defendants M. Hugh Stuart and Edgar W. Stuart, d/b/a Tan-Kar Oil Company, to unload oil and gasoline from a tank car on the siding above described; that on said date the plaintiff was engaged in the work of unloading a tank car located at, to-wit, the Atlantic Coast Line Railroad Company siding at the North end of Tallapoosa Street and while the plaintiff was so engaged at said place on said date, the plaintiff was seriously and permanently injured and damaged in this, to-wit, he suffered bruises, contusions, lacerations, and cuts on his left leg, left arm; and left shoulder and other parts of his body, he suffered and continues to suffer muscle spasms of the neck and back, he suffered and continues to suffer from sprains of the thorasis spine and lower cervical spine, he was serioùsly injured, he was permanently injured, he has lost time from his employment, he has incurred expenses for medical care and treatment.

Plaintiff avers that he received such injuries and suffered such damages as a proximate result and consequence of the negligence of the defendants, M. Hugh Stuart and Edgar W. Stuart in failing to furnish him with a safe place in which to work and the negligence of the defendant Atlantic Coast Line Rail-

road Company in failing to maintain a safe and secure wooden structure around the dome of said tank car and plaintiff avers that he received such injuries and suffered such damages as a result of the concurring result of the defendant Atlantic Coast Line Railroad Company and M. Hugh Stuart and Edgar W. Stuart.

Count II.

Plaintiff claims of the defendant the sum of Twenty-Five Thousand ($25,000) Dollars as damages for that on heretofore, to-wit, May 6th, 1952, the defendant Atlantic Coast Line Railroad Company was engaged in business as a common carrier and as such was engaged in the business of transporting oil and gasoline for hire in interstate commerce and in connection therewith did operate a train and place a tank car on a siding for unloading purposes, said siding being located, to-wit, at the North end of Tallapoosa Street in the City and County of Montgomery, Alabama and plaintiff avers that said tank car did have a wooden sidewalk around the top of said tank car, and plaintiff avers that on said date the defendants M. Hugh Stuart and W. Edgar Stuart were engaged in the business of buying and selling oil and gasoline and as an incident to such business had a tank car placed on the siding as above described for the purpose of unloading oil and gasoline on said date the plaintiff had been employed by the said M. Hugh Stuart and Edgar W. Stuart to unload oil and gasoline from a tank car on the siding as above described; that on said date the plaintiff was engaged in the work of unloading a

tank car located at, to-wit, the Atlantic Coast Line Railroad Company siding at the North end of Tallapoosa Street, Montgomery, Alabama, and while the plaintiff was so engaged at said place on said date the wooden walkway around the top of one of the tank cars did collapse and the plaintiff was seriously and permanently injured in this, to-wit: he suffered bruises, contusions, lacerations, and cuts on his left leg, left arm and left shoulder and other parts of his body, he suffered and continues to suffer muscle spasms of the neck and back; he suffered and continues to suffer from sprains of the thorasic spine and lower cervical spine; he was seriously injured; he was permanently injured; he has lost time from his employment; he has incurred expenses for medical care and treatment.

Plaintiff avers that he received such injuries and suffered such damages as a proximate result and consequence of the negligence of the defendants M. Hugh Stuart and Edgar W. Stuart in failing to furnish him with a safe place in which to work and the negligence of the defendants Atlantic Coast Line Railroad Company and ABC Company in failing to maintain a safe and secure wooden structure around the dome of said tank car and plaintiff avers that he received such injuries and suffered such damages as a result of the concurring result of the defendants Atlantic Coast Line Railroad Company and M. Hugh Stuart and Edgar W. Stuart.

(S.) GODBOLD & HOBBS.
Attorneys for Plaintiff.

Plaintiff demands a trial by jury.

(S.) GODBOLD & HOBBS.

Filed in U.S. District Court, August 28, 1953.
O. D. STREET, JR.,
Clerk.

INTERROGATORIES PROPOUNDED TO DEFENDANT ATLANTIC COAST LINE RAILROAD COMPANY.

In the Circuit Court of Montgomery County, Alabama.

W. A. Shields, Plaintiff,
vs.
Atlantic Coast Line Railroad Company, Et Al, Defendants.

Comes now the plaintiff and desiring the testimony of the defendant Atlantic Coast Line Railroad Company files herewith the following interrogatories to be propounded to the defendant Atlantic Coast Line Railroad Company under the provisions of Title 7, Section 477 et seq of the Code of Alabama 1940 as amended.

I.

1. Is the Atlantic Coast Line Railroad Company a corporation?

2. If so, when and where was it incorporated?

3. On May 6, 1952 was it engaged in the business of operating a railroad as a common carrier in trans-

porting freight and passengers for hire in interstate commerce?

4. Is your name correctly stated in the complaint? If not, please state your correct name.

II.

1. On or about May 5, 1952, was there delivered to the defendant Atlantic Coast Line Railroad Company a tank car, SHPX 21336?

2. If so, where did you receive said tank car SHPX 21336? Please specify what city, what location within such city.

3. Who delivered such tank car?

4. After you received said tank car SHPX 21336, was it hauled or used on the railroad lines of defendant Atlantic Coast Line Railroad Company?

5. Where was said tank car hauled or used on such lines?

6. Was tank car SHPX 21336 hauled or used by you on the railroad lines or tracks located at the west end of Tallapoosa Street known as the Bell Stree siding in the City and County of Montgomery?

7. If you state it was not so hauled by you, by whom was it so hauled?

8. Was said tank car hauled or used by you to place or spot it for the purpose of having the con-

signee unload said tank car on a siding or track at said Bell Street siding, Montgomery, Alabama?

9. If you state it was not so handled by you, by whom was it so handled or used?

10. If you state that said tank car was so hauled for such purpose, please state on which track or siding at the said Bell Street siding, Montgomery, Alabama, said tank car was placed or spotted?

11. Who owns the track or siding at the said Bell Street siding, Montgomery, Alabama where tank car SHPX 21336 was placed or spotted?

12. Does said track or siding belong to defendant Atlantic Coast Line Railroad Company?

III.

1. Were any inspections of tank car SHPX 21336 ever made by you during the period of time from approximately May 4, 1952 to May 7, 1952?

2. If such inspection or inspections were made by you, when was each such inspection made? Of what did such inspections consist?

3. Where was each such inspection made?

4. Who made each such inspection?

5. What are the names and positions of each person who made each such inspection.

6. Did any such inspection or inspections include an inspection of the running boards near the top or dome of tank car SHPX 21336?

7. If you state that an inspection of said running board or boards was made, did such inspection reveal the rotten, decayed or deteriorated condition of said running board or boards?

8. If you state that an inspection of said running board or boards was made, what did such inspection reveal?

9. Were said running boards made of wood?

10. Please describe said running boards giving length, width, type of material, size of material, how attached to tank car.

11. When tank car SHPX 21336 was delivered to you, were the running boards near the top or dome of said car in a decayed, rotten or deteriorated condition?

12. When tank car SHPX 21336 was delivered to you, in what condition were the running boards near the top or dome of said car?

13. If the defective condition of said running boards was found by you, did you warn plaintiff or consignee of such condition?

14. If the defective condition of said running boards was found by you, were any repairs made to said running board or boards?

15. If such defective condition of said running boards was found by you and no repairs to said running board or boards were made, did you warn or notify plaintiff or consignee of such defective condition?

16. Is the inspection given all running boards on a tank car such as SHPX 21336 the same?

17. Are inspections always made on all running boards of cars when it is known persons will be using said running boards?

18. If not, why not?

19. Is the inspection given the running boards of cars delivered by another railroad to you the same as the inspection of running boards of cars delivered by you to a shipper to be loaded?

20. If such inspections are different, please state in what manner such inspections are different.

21. Why are such inspections different?

IV.

1. Who was the consignor of SHPX 21336 when it was delivered to you on or about May 4, 1952?

2. What was the address of such consignor?

3. Who furnished SHPX 21336 to such consignor?

4. Who originated the hauling of SHPX 21336 at such time?

5. Please attach to your answers copies of any bills of lading, weight bills or other documents in your possession concerning the shipment of SHPX 21336 in question.

6. Were you paid any money for hauling, transporting o switching SHPX 21336 during the period of approximately May 4, 1952 to approximately May 7, 1952.

7. Was such payment for transporting, hauling or switching SHPX 21336 made for the consignment of said car to Tan Kar Oil Co., Montgomery, Alabama?

8. When SHPX 21336 was delivered to you on or about May 4, 1952, who was the consignee of such shipment?

9. Was it Tan-Kar Oil Co., Montgomery, Alabama?

10. Was the consignee notified when SHPX 21336 was placed or spotted for unloading?

11. When was such notice given?

12. By whom was such notice given?

13. To whom was such notice given?

14. How was such notice given?

V.

1. Did you know that SHPX 21336 was to be unloaded May 6, 1952?

2. When SHPX 21336 was spotted or placed on a track or siding at the west end of Tallapoosa Street, known as Bell Street siding, Montgomery, Alabama, did you know the consignee or someone duly authorized by consignee would unload it?

3. Did you know that it would be necessary for a person unloading said car to stand on the running board near the top or dome of said car?

4. Did you know it would be necessary for a person unloading said car to lift the lid or dome of said car to check the cut off valve before unloading said car?

VI.

1. On May 6, 1952, did the plaintiff report his injury to you or to one of your employees?

2. If so, to whom was such report made?

3. Did you make any investigation of plaintiff's accident and injury on May 6, 1952?

4. Did you inspect the defective running board of SHPX 21336 which caused plaintiff's injuries after said accident?

5. Who made such an investigation?

6. What did the investigation disclose?

7. To your knowledge were pictures made of the defective running board after the plaintiff was injured? Were the pictures made by direction of personnel of defendant Atlantic Coast Line Railroad Co.? Please attach to these interrogatories copies of any pictures taken by you or at your direction.

VII.

1. Has plaintiff given you or any of your representatives a statement regarding the accident made the basis of this suit?

2. If so, was the statement oral or written?

3. If it was a written statement, then please attach the original statement to your answers to these interrogatories and mark same property as an exhibit.

4. If you have declined to attach the original of said statement, then please attach a true and correct copy thereof and mark the same properly as an exhibit.

5. If it was an oral statement, then please state when and where and to whom the statement was given.

6. Give the substance of said statement.

GODBOLD & HOBBS;
(Signed) By ALBERT W. COPELAND,
Attorneys for Plaintiff.

State of Alabama,
County of Montgomery.

Before me, John C. Godbold, a Notary Public, in and for said State and County, personally appeared Alber W. Copeland who, being by me first duly sworn, on oath, deposes and says that he is one of the attorneys for the plaintiff in the above-styled cause and as such has authority to make this affidavit, and that the answers of the defendant Atlantic Coast Line Railroad Company to the foregoing interrogatories, when truthfully made, will be material evidence for the plaintiff upon the trial of said cause.

(Signed) ALBERT W. COPELAND.

Sworn to and subscribed before me this 15th day of June, 1953.

(Signed) JOHN C. GODBOLD,
Notary Public.

Filed Aug. 28, 1953, O. D. Street, Jr., Clerk.

INTERROGATORIES PROPOUNDED TO PLAINTIFF, W. A. SHIELDS.

In the Circuit Court of Montgomery County, Alabama.

W. A. Shields, Plaintiff,

v.

Atlantic Coast Line Railroad Company, Et. Al, Defendants.

Comes now the Defendant, Atlantic Coast Line Railroad Company, and desiring the testimony of the Plaintiff, W. A. Shields, files herewith the following interrogatories to be propounded to the Plaintiff, W. A. Shields, under the provisions of Title 7, Section 477 et seq of the Code of Alabama 1940 as amended.

I

1. Up to the time of the accident complained of, how long had you been engaged in the occupation of unloading freight cars?

2. Had you ever unloaded tank cars before, similar in construction to tank car SHPX 21336?

3. Was it customary for you to look at or visually inspect such tank cars before climbing upon them to unload them?

4. Did you look at or visually inspect the running board or dome step board on tank car SHPX 21336 before climbing upon it on May 6, 1952?

5. Was there any visible defect in the running board or dome step board before the accident?

6. Was the running board or dome step board of tank car SHPX 21336 apparently in good condition before the accident?

II.

1. Have you been treated by any physician or surgeon for the injuries which you claim to have received in said accident and for which you are suing in this case?

III.

1. If you have been treated by any physician or surgeon for such injuries, state the name and address of each and every such physician or surgeon.

2. State the number of times you have been treated by each and every such physician or surgeon.

3. State the dates on which you were treated by each and every such physician or surgeon.

4. State the diagnosis of your injuries or condition by each such physician or surgeon.

5. State the treatment given by each and every such physician or surgeon for your said injuries.

IV.

1. Have you received any statement or statements for services rendered from any physician or surgeon you claim treated you for such injuries?

V.

1. If you have received a statement or statements for services rendered by any physician or surgeon for such injuries, then list each and every statement or statements you have received by the date, doctor's name and amount.

2. In reference to each and every such statement or statements, state whether or not the statement contained items of services other than the injuries for which you are suing in this case.

3. If so, state which of said statements contain such items.

4. State the amount of such items on said statements.

5. State which of said statements listed above you have paid.

6. State which of said statements have been paid by others for you at your request.

7. Attach to and make a part of your answer to this question the original or a true copy of each and every such statemnt or statements you have received from each and every physician and sur-

geon you claim to have treated you for such injuries.

VI.

1. Have you paid any amounts of money to any physician or surgeon for the treatment of your alleged injuries other than those set out above?

VII.

1. If your answer to the next preceding question is that you have paid any amounts to any physician or surgeon other than those set out above, explain fully, itemizing as to dates and amounts.

VIII.

1. Have you incurred any expenses for nurses as a result of the injuries received in said accident?

IX.

1. If you have incurred expenses for nurses as a result of said injuries, state each and every such expense you incurred.

2. State the period or periods covered by each and every such expense.

3. State whether or not you have paid such expense.

4. If you have not paid all of said expenses, please state those that you have not paid.

5. Which of said expenses have been paid by others for you at your request?

6. State to whom each and every such expense was incurred.

X.

1. Have you been in any hospital or hospitals as a result of the injuries received in said accident in this case?

XI.

1. If you have been in any hospital or hospitals as a result of the injuries received in said accident, state the name of each and every hospital.

2. State the location of each and every hospital or hospitals you have been in as a result of the injuries received in said accident.

3. State the date of admission to and the date of discharge from each such hospital.

4. State the name of each and every physician or surgeon who treated you in each and every such hospital.

XII.

1. Have you incurred any hospital bills as a result of the injuries you allege to have received in said accident and for which you are suing in this case?

XIII.

1. If you have incurred hospital bills as a result of said injuries, please list each and every hospital bill or expense you incurred.

2. State the period or periods covered by each such hospital bill or expense.

3. Attach to and make a part of your answer to this question a true and correct copy of each hospital bill rendered to you.

4. Indicate which of the hospital bills you have paid.

5. Indicate which of the hospital bills have been paid by others for you at your request.

XIV.

1. Have you incurred any expense for medicine as a result of your alleged injuries?

2. If so, itemize such expenses giving in the case of each such expense, the amount, date incurred, to whom paid or owing, a description of the item or services involved.

3. Have you sustained any expenses other than those listed above as a result of the injuries you received in such accident?

4. If so, itemize such expenses, giving in the case of each such expense, the amount, date incurred,

to whom paid or owing, a description of the item services, expense or charge involved.

XV.

1. Were you confined to bed as a result of the injuries received in said accident?

2. If so, state the street address of the place at which you were confined.

3. For what length of time were you confined to your bed?

XVI.

1. Did you engage in business for yourself within two years next preceding said accident?

2. If you did engage in business for yourself within two years next preceding said accident, what was the nature of each and every business you engaged in for yourself?

3. What was the name under which you engaged in each and every such business?

4. State the period or periods (giving exact dates) during which you were engaged in each and every such business for yourself.

5. State the amount of money earned by you while you were engaged in each and every business for yourself.

XVII.

1. Did you lose any time from your occupation on account of the injuries you claim to have received in said accident?

2. If so, please state the exact amount of time you lost.

3. State the days on which you did not work.

4. Did you lose any wages, salary, commissions, compensation, bonuses or the like on account of the injuries you claim to have received in said accident?

5. If you did lose any wages, salary, commissions, compensation, bonuses or the like on account of the injuries you claim to have received in said accident, please state the amount of wages, salary, etc., you lost.

6. State the period or periods during which you lost such wages, salary, etc.

XVIII.

1. Are you now actively engaged in an occupation?

2. If so, what occupation are you engaged in?

(S.) EVANS HINSON,
(Evans Hinson),
Attorney for Defendant,
Atlantic Coast Line Railroad Company.

State of Alabama,
Montgomery County.

Personally appeared before me, D. N. Hamilton, a Notary Public in and for the State and County aforesaid, Evans Hinson, who having been by me first duly sworn, deposed and says:

That he is one of the attorneys for Atlantic Coast Line Railroad Co., defendant in above styled cause and that answers of the plaintiff to the foregoing interrogatories will be material testimony for the defendant upon the trial of this case.

EVANS HINSON,
(Evans Hinson),
Attorney for Defendant.

Sworn to and subscribed before me this 24 day of June, 1953.

(S.) D. N. HAMILTON,
Notary Public.

I or we hereby accept service of a copy of the foregoing interrogatories and expressly waive any other service as required by law on this the 25 day of June, 1953.

ALBERT W. COPELAND,
Atty. for Plaintiff.

Filed Aug. 28, 1953, O. D. Street Jr., Clerk.

ANSWERS TO INTERROGATORIES PROPOUNDED TO DEFENDANT BY PLAINTIFF IN ABOVE CASE.

In the Circuit Court of ~~Montgomery~~ County, Alabama.

W. A. Shields, Plaintiff,
vs.
Atlantic Coast Line Railroad Company, Et Al, Defendants.

I.

1. Yes.

2. In the State of Virginia.

3. Yes.

4. Yes.

II.

1. This car was delivered at 5:00 P.M., May 4, 1952.

2. Day Street Yard, Montgomery, Alabama.

3. Western of Alabama Railway.

4. Only in a switching movement from Day Street Yards to Short Bulk Track off Bell St.

5. It was switched from Day Street Yard to Short Bulk Track near ACL Transfer, Montgomery Freight Station.

6. It was switched on track known as Short Bulk Track.

7. .....

8. Yes, this car was moved in a switching movement from the Day Street Yard to place it on the Short Bulk Track opposite Bell Street for unloading.

9. .....

10. Short Bulk Track.

11. Atlantic Coast Line Railroad Company.

12. Yes.

III.

1. Yes.

2. On May 4, 1952, when received from Western of Alabama, the usual inspection was given; that is, moving parts of the car were inspected in order to determine whether it was safe to move it in the switching movement. A visual inspection was made as to the balance of the car.

3. Montgomery, Alabama.

4. Car Inspector.

5. C. B. Shirley, Car Inspector.

6. The defendant did not furnish this car to the consignor for loading. A visual inspection, however, was made of the running boards near the top or dome tank of the car.

7. No. The running boards appeared to be in good condition, and they appeared to have been recently painted.

8. See No. Seven.

9. Yes.

10. The boards were 2 inches by 7½ inches and 6 feet long, made of wood and attached to the car by brackets and bolts.

11. The running boards which were part of the loading and unloading device of the car, and which had nothing to do with the running gear of the car, were given only a visual inspection, and defendant could not determine at the time the car was delivered whether said running boards were decayed, rottened or deteriorated. However, after the running board broke or gave away it was determined that it was rottened or decayed within near the brackets and the entire board had been painted over.

12. See No. Eleven.

13. See No. Eleven.

14. See No. Eleven.

15. See No. Eleven.

16. On cars received from other roads, which cars the defendant did not furnish, the inspection given such running boards is the same as that given on this car.

17. It is the obligation of the road furnishing the car to the consignor to see that the loading and unloading devices are in good order, and a carrier who merely performs a switching service or a delivering carrier customarily gives the unloading devices, such as running boards around the tank, a visual inspection only.

18. There is no legal obligation on the part of a switching carrier that picks up a car to spot for unloading, or on a delivering carrier who takes a car from another road, to give a thorough test and inspection to the unloading devices on a car since it is the obligation of the carrier or car service furnishing the car to see that the unloading devices are in good working order. If every intermediate carrier, switching carrier and delivering carrier tested the unloading devices and parts used in unloading of every car which it hauled before moving it on, it would disrupt and delay freight service.

19. Not always, since in some cases when we furnished a car to a consignor for a particular type of loading a more minute inspection is given to definitely assure suitable equipment.

20. See No. Nineteen.

21. The road furnishing the car, or the car service furnishing the car, for a particular type of loading, has the obligation of supplying a car suitable for the purpose for which it was ordered.

IV.

1. The Bay Petro Corporation, New Orleans, La.

2. New Orleans, La. As far as defendant knows.

3. The New Orleans and Northeastern Railroad, which is a part of the Southern Railway System, or Shippers Car Line Corp., 30 Church Street, New York 7, New York, the owner of the car.

4. New Orleans and Northeastern Railroad.

5. See attached copies.

6. Yes, by the Western Railway of Alabama.

7. For switching this car.

8. Tan-Kar Oil Company, Montgomery, Alabama.

9. Yes.

10. No.

11. None.

12. None.

13. None.

14. None.

V.

1. No.

2. Yes.

3. No.

4. No.

VI.

1. Yes.

2. Mr. M. Thrash, Trainmaster.

3. Yes.

4. Yes.

5. Mr. Van Williams, Jr.

6. One end of the dome platform board broken near the mounting bracket due to interior decay and the presence of three knots in the board near the mounting bracket.

7. Yes. We have now available only one set of these pictures and will be glad to lend them to you and have them present at the trial, but they are part of our investigation and we object to releasing them absolutely.

VII.

1. Yes.

2. Written.

3. We attach herewith a copy of this statement.

4. See No. Three.

5. See No. Two.

6. See No. Two.

Copy.

Subject: Personal Injury—W. A. Shields, Licensee, Montgomery, Alabama. 5/6/52.

Name—W. A. Shields—Age 39—Color W.

Residence—406 Herron St., Montgomery, Ala.

Occupation—Maintenance Man Tan-Kar Oil Co.

May 13, 1952.

I am employed by the Tan-Kar Oil Co., which operates about 9 stations.

About 3:00 P. M., May 6, 1952, I was at the ACL track near the Freight Station. SHPX 21336 car of gasoline from Port Chalmette, La., was placed for unloading. Frank Watkins was my helper and we were opening the dome preparing to pump the gas to the tanks of the Blue & Gray Station on Bell St.

I was standing on the dome step on the south side of the car. I stepped on the platform after I opened the dome and the platform gave way causing me to fall about 10 feet to the ground. The platform is just one board 2x8 material about 6 or 8 feet long and it broke about 12 to 15 from the east end.

I was sent to Dr. Cobbs shortly after my injury. Left arm was skinned, left ankle bruised, left shoulder and back were bruised. Dr. Cobbs said I probably had sprained and bruised muscle in my back.

Thus far I have lost no time. I have not been able to do all my work but have Watkins do the heavy work. I have been back to Dr. Cobbs one time after my first visit. My left side is still sore and I am not yet well.

(Signed) W. A. SHIELDS.

Witness
R. E. ROSSER.

State of Alabama,
Montgomery County.

Before me, B. F. Chunn, a Notary Public in and for said State and County, personally appeared O. V. Horace, Supt. of Atlantic Coast Line Railroad Company at Montgomery, Alabama, who having been by me duly sworn deposes and says that he is familiar with the records of the Atlantic Coast Line Railroad Company and that the foregoing answers are true and correct to the best of his information and belief.

Sworn to and subscribed before me this 20th day of August, 1953.

(S.) B. F. CHUNN,
Notary Public.

My commission expires December 21, 1955.
(Seal) Notary Public.

Filed Aug. 28, 1953., O. D. Street Jr., Clerk.

In the Circuit Court of Montgomery County, Alabama.

W. A. Shields, Plaintiff,
vs.
Atlantic Coast Line Railroad Company, et als, Defendants.

Comes now the plaintiff in the above styled cause and with leave of Court first had and obtained amends his complaint heretofore filed in this cause as follows:

A. By striking as party defendants M. Hugh Stuart and Edgar W. Stuart, d/b/a Tan-Kar Oil Company.

B. By amending Counts I and II to read as follows:

Count I.

The plaintiff claims of the defendants the sum of $25,000 damages for that heretofore on, to-wit: May

6, 1952, the defendant Atlantic Coast Line Railroad Company, (hereafter sometimes called Atlantic) and the defendant ABC Corporation, whose name is otherwise unknown, (hereafter sometimes called ABC) each were engaged in the business of operating a railroad as a common carrier in transporting freight and passengers for hire in interstate commerce; the defendant ABC on, to-wit: May 4, 1952, did have in its possession, or take possession of, a tank car, to-wit: SHPX 21336, of gasoline at New Orleans, Louisiana, and, for hire, did serve as the originating carrier on said tank car, said tank car being consigned to Tan-Kar Oil Company, Montgomery, Alabama, and did transport the said tank car on its railroad lines. The said tank car was on, to-wit: May 1, 1952, delivered to the defendant Atlantic at, to-wit: Montgomery, Alabama, and was transported, hauled or used on the railroad lines of the said defendant, Atlantic, said transporting hauling or use including the placing or location of said car by it on a siding or track belonging to it located at, to-wit: the west end of Tallapoosa Street in the City and County of Montgomery, Alabama, for the purpose of having the consignee unload said tank car.

Plaintiff avers that the running board of said tank car which running board is located near the top or dome of the car was defective in that said running board, which was of wood, was in a rotten or deteriorated condition; plaintiff avers that said running board was not a secure running board under the provisions of the Federal Safety Appliance Act (Title 41, United States Code Annotated, Section 11). Plaintiff avers that the defendant Atlantic, in violation of

the Federal Safety Appliance Act, hauled or permitted to be hauled or used on its line said tank car.

Plaintiff avers that the defendant ABC negligently furnished a defective tank car for the shipment of said gasoline, or furnished a tank car which it knew or by the exercise of reasonable diligence should have known was defective, or failed to make an inspection of said tank car to determine whether it was safe for unloading, or failed to give plaintiff warning of the defective condition of said tank car of which defective condition said defendant knew or could have discovered by a reasonable inspection thereof, or failed to make repairs to said tank car after its efective condition was discovered or should have been discovered, or failed to warn plaintiff of the defective condition of said tank car after no repairs were made. And plaintiff avers that defendant ABC knew or should have known that persons would stand on said running board in the process of unloading the gasoline from the car.

On, to-with: May 6, 1952, plaintiff was sent by consignee, Tan-Kar Oil Company, to unload said tank car for it, and was on the premises of the defendant Atlantic by invitation of said defendant express or implied, and was where he had a right to be. While engaged in unloading said tank car plaintiff stood on said defective and insecure running board and said running board broke and plaintiff fell to the railroad track and thereby as a proximate result and consequence thereof, plaintiff was seriously and permanently injured in this, to-wit:

He suffered bruises, contusions, lacerations and cuts on his left leg, left arm, and left shoulder and other parts of his body; he suffered and continues to suffer muscle spasms of the neck and back; he suffered and continues to suffer from sprains of the thorasic spine and lower cervical spine; he suffered and continues to suffer from a lipping of the adjacent bodies of the fifth and sixth cervical vertebrae; he suffered and continues to suffer from severe pains through his left arm, left shoulder and neck. He suffered and continues to suffer from a restricted use of his left arm and left shoulder. He was seriously injured. He was permanently injured. He has lost time from his employment, he has incurred expenses for medical care and treatment and will continue to incur such expenses.

Plaintiff avers that the violation by the defendant Atlantic of the Federal Safety Appliance Act as aforesaid united or concurred with the negligence as aforesaid of the defendant ABC in proximately causing the injury and damage to plaintiff as aforesaid.

Count II.

Plaintiff claims of the defendants the sum of Twenty Five Thousand ($25,000) Dollars as damages for that heretofore on, to-wit: May 6, 1952, the defendant Atlantic Coast Line Railroad Company (hereafter sometimes called the Atlantic), and defendant ABC Corporation, whose name is otherwise unknown (hereafter sometimes called ABC) each were engaged in the business of operating a railroad as a common carrier in transporting freight and passen-

gers for hire in interstate commerce; the defendant ABC on, to-wit: May 4, 1952, did have in its possession or take possession of a tank car, to-wit: SHPX 21336, of gasoline at New Orleans, Louisiana, and for hire did serve as the originating carrier on said tank car, said tank car being consigned to Tan-Kar Oil Company, Montgomery, Alabama, and did transport the said tank car on its railroad lines. The said tank car was on, to-wit: May 5, 1952, delivered to the defendant Atlantic at, to-wit: Montgomery, Alabama, and was transported, hauled or used on the railroad lines of the said defendant Atlantic, said transporting, hauling or use including the placing or location of said car by it on a siding or track belonging to it located at, to-wit: the west end of Tallapoosa Street in the City and County of Montgomery, Alabama, for the purpose of having the consignee unload said tank car. Plaintiff avers that the running board of said tank car, which running board is located near the top or dome of the car, was defective in that said running board, which was of wood, was in a rotten or deteriorated condition.

Plaintiff avers that the defendant ABC negligently furnished a defective tank car for the shipment of said gasoline, or furnished a tank car which it knew or by the exercise of reasonable diligence should have known was defective, or failed to make an inspection of said tank car to determine whether it was safe for unloading, or failed to give plaintiff warning of the defective condition of said tank car of which defective condition said defendant knew or could have discovered by a reasonable inspection thereof, or failed to make repairs to said tank car after its defective condition was discovered or should

have been discovered, or failed to warn plaintiff of the defective condition of said tank car after no repairs were made. And plaintiff avers that defendant ABC knew or should have known that persons would stand on said running board in the process of unloading the gasoline from the car.

Plaintiff avers that the defendant Atlantic negligely furnished a defective tank car for the unloading of the gasoline contained therein; or furnished a tank car which it knew or by the exercise of reasonable diligence could have known was defective, or failed to make an inspection of said tank car to determine whether it was safe for unloading, or failed to give plaintiff warning of the defective condition of said tank car of which defective condition said defendant knew or could have discovered by a reasonable inspection thereof, or failed to make repairs to said tank car after its defective condition was discovered or should have been discovered, or failed to warn plaintiff of the defective condition of said tank car after no repairs were made. And plaintiff avers that the defendant Atlantic knew or should have known that persons would stand on said running board in the process of unloading the gasoline from the car.

On, to-wit: May 6, 1952, plaintiff was sent by consignee, Tan-Kar Oil Company, to unload said tank car for it, and was on the premises of the defendant Atlantic by invitation of said defendant express or implied, and was where he had a right to be. While engaged in unloading said tank car plaintiff stood on the said defective and insecure running board and said running board broke and plaintiff fell to the railroad track and thereby as a proximate

result and consequence thereof, plaintiff was seriously and permanently injured in this:

He suffered bruises, contusions, lacerations and cuts on his left leg, left arm, and left shoulder and other parts of his body; he suffered and continues to suffer muscle spasms of the neck and back; he suffered and continues to suffer from sprains of the thorasic spine and lower cervical spine; he suffered and continues to suffer from a lipping of the adjacent bodies of the fifth and sixth cervical vertebrae; he suffered and continues to suffer from severe pains through his left arm, left shoulder and neck. He suffered and continues to suffer from a restricted use of his left arm and left shoulder. He was seriously injured. He was permanently injured. He has lost time from his employment, he has incurred expenses for medical care and treatment and will continue to incur such expenses.

Plaintiff avers that the negligence, as aforesaid, of the defendant Atlantic united or concurred with the negligence as aforesaid of the defendant ABC in proximately causing the injury and damage to plaintiff as aforesaid.

GODBOLD & HOBBS,
(By) ALBERT W. COPELAND,
Attorneys for Plaintiff.

Plaintiff demands a trial by jury.

GODBOLD & HOBBS,
(By) ALBERT W. COPELAND.

Filed August 28, 1953, O. D. Street, Jr., Clerk.

MOTION TO STRIKE.

In the District Court of the United States for the Northern Division of the Middle District of Alabama.

W. A. Shields, Plaintiff,
versus Civ. No. 896-N.
Atlantic Coast Line Railroad Company, A Corporation, and ABC Company, A Corporation whose name is otherwise unknown but will be substituted when discovered, Defendants.

Comes the Defendant, the Atlantic Coast Line Railroad Company, a corporation, and moves this Honorable Court to strike or dismiss Count I and Count 2 of Plaintiff's Complaint as amended, and said Defendant assigns as grounds for this motion the following:

(1) Plaintiff's Complaint states no cause of action.

(2) Plaintiff fails to allege any facts that charge Defendant, Atlantic Coast Line Railroad Company, with any act of negligence.

(3) Plaintiff's Complaint discloses no breach of duty owed by the Defendant, Atlantic Coast Line Railroad Company, to the Plaintiff.

(4) From ought that appears in Plaintiff's Complaint, the defect referred to was a patent or hidden defect for which the Defendant, Atlantic Coast Line Railroad Company, would not be liable.

(5) Plaintiff's Complaint fails to allege that the Defendant, Atlantic Coast Line Railroad Company, furnished the car to the shipper and Plaintiff's Complaint further fails to allege that the defect in said car was a patent defect which is the only type of defect which the Defendant, Atlantic Coast Line Railroad Company, would be liable for, if said Defendant, Atlantic Coast Line Railroad Company, did not furnish the car in question.

(6) The said Safety Appliance Act (Title 45 U. S. Code Annotated Section 11) is not applicable in this case in that said statute was enacted for the benefit of and is for the protection of employees of railroads, and the Plaintiff in this case was not at the time of the accident an employee of the Defendant, Atlantic Coast Line Railroad Company, or any other railroad, and Plaintiff has not averred in his Complaint that he was an employee of any railroad.

(7) The Federal Safety Appliance Act (Title 45 U. S. Annotated Section 11) has no application to and does not apply to that part of the railroad tank car that was defective; that is, to-wit: the platform near the top or dome of the car, it affirmatively appears in Plaintiff's Complaint that that part of the railroad tank car which was defective was not a "running board" as described in said Safety Appliance Act.

EVANS HINSON,
Attorney for the Defendant,
Atlantic Coast Line Railroad Company.

This is to certify that I have mailed a copy of the above pleading to Godbold & Hobbs, Attorneys at

Law, Montgomery, Alabama, attorneys for the Plaintiff, on this the 15 day of September, 1953.

Filed Sept. 16, 1953.

AMENDMENT TO COMPLAINT.

In the District Court of the United States for the Northern Division of the Middle District of Alabama.

W. A. Shields, Plaintiff,

vs. Civil No. 896-N.

Atlantic Coast Line Railroad Company and Southern Ry., Company, a corporation, Defendants.

Comes now the plaintiff and amends his complaint as last amended by substituting for ABC Company, a corporation, whose name is otherwise unknown, and at each and every place in each and every count of said complaint where said ABC Company, a corporation, whose name is otherwise unknown, appears, Southern Railway Company.

JOHN C. GODBOLD,
Attorney for Plaintiff, W. A. Shields.

Filed September 23, 1953

(Title Omitted.)

To the Honorable C. B. Kennamer,
Judge of said Court:

Comes Southern Railway Company, a corporation, which was first named as one of the defendants in plaintiff's complaint, as last amended, and moves the Court to dismiss plaintiff's complaint, as last amended, and each count thereof, both separately and severally, as against this defendant, Southern Railway Company; and as grounds therefor, both separately and severally, this defendant says:

A. That process against this defendant in the complaint filed in the Circuit Court of Montgomery County, Alabama, was insufficient in that:

(1) The original complaint wholly failed to state that the plaintiff was ignorant of the name of this defendant, as required by Title 7, Section 136, of the Code of Alabama of 1940;

(2) That said original complaint did not identify ABC Company as an unknown defendant, as required by Title 7, Section 136, of the Code of Alabama of 1940;

(3) That said original complaint did not identify ABC Company as a fictitious defendant, as required by Title 7, Section 136, of the Code of Alabama of 1940;

(4) That said original complaint wholly failed to contain any identifying description which would

identify ABC Company as being this defendant, Southern Railway Company;

(5) That said original complaint failed to state that the plaintiff was ignorant of the name of this defendant;

(6) For aught that appears in said original complaint, ABC Company is a real and existing defendant;

(7) The original complaint failed to designate this defendant by fictitious name as required by law; and that the amended complaint did not relate back to the original complaint, as to this defendant, for the reason that it affirmatively appears in said complaint that the statute of limitation of one year had expired at the time said original complaint was first amended;

(8) That the filing of the original complaint in the Circuit Court of Montgomery County, Alabama, did not toll the limitation of action of one year against this defendant, Southern Railway Company, for the reason that said complaint did not properly designate this defendant by a fictitious name, as required by law;

B. Venue in the original suit filed in the Circuit Court of Montgomery County, Alabama, was improper as to this defendant, Southern Railway Company, and this defendant was not liable to suit in said county, for that:

(1) Southern Railway Company is a foreign corporation, organized under the laws of the State of Virginia, and said defendant does no business by agent in Montgomery County, Alabama;

(2) That Southern Railway Company is a foreign corporation, which does no business by agent in Montgomery County, Alabama; and it affirmatively appears on the face of plaintiff's complaint that the limitation of action of one year had expired at the time of the amendment to the complaint naming Southern Railway Company as a defendant in this cause in this Court;

(C) That said complaint fails to state a claim upon which relief can be granted against this defendant, Southern Railway Company, for that:

(1) The original complaint wholly failed to state that the plaintiff was ignorant of the name of this defendant, as required by Title 7, Section 136, of the Code of Alabama of 1940;

(2) That said original complaint did not identify ABC Company as an unknown defendant, as required by Title 7, Section 136, of the Code of Alabama of 1940;

(3) That said original complaint did not identify ABC Company as a fictitious defendant, as required by Title 7, Section 136, of the Code of Alabama of 1940;

(4) That said original complaint wholly failed to contain any identifying description which would

identify ABC Company as being this defendant, Southern Railway Company;

(5) That said original complaint failed to state that the plaintiff was ignorant of the name of this defendant;

(6) For aught that appears in said original complaint, ABC Company is a real and existing defendant;

(7) The original complaint failed to name this defendant, as required by law, and that the amended complaint did not relate back to the original complaint, as to this defendant, for the reason that it affirmatively appears in said complaint that the statute of limitation of one year had expired at the time said original complaint was first amended;

(8) That the filing of the original complaint in the Circuit Court of Montgomery County, Alabama, did not toll the limitation of action of one year against this defendant, Southern Railway Company, for the reason that said complaint did not properly designate this defendant by a fictitious name, as required by law;

(9) It affirmatively appears that Southern Railway Company and ABC Company are not one and and the same party, and that the limitation of action of one year had expired at the time Southern Railway Company was first named as a defendant in this cause;

(10) That Count One, as amended, constitutes a departure in that it states an entirely new cause of action against this defendant;

(11) That Count Two, as amended, constitutes a departure in that it states an entirely new cause of action against this defendant;

(12) That the amendment to the complaint does not relate back to the original complaint for the reason that the amended complaint sets forth new and distinct causes of action against this defendant, and the same were not filed within the time allowed by law for commencing action thereon, so that said action was barred at the time of the filing of said amended complaint:

(13) That the amendment to the complaint adding Southern Railway Company as a defendant, constituted a departure in that the original complaint did not designate or identify this defendant by fictitious name, as required by law;

(14) That the amendment to the complaint does not relate back to the commencement of the suit for the reason that such amendment adds an entirely new cause of action against this defendant;

(15) That the amended complaint does not relate back to the commencement of the suit for the reason that such amendment adds Southern Railway Company as a party defendant, and as appears on the face of said complaint, at the time of such amendment, the cause of action against this defendant was barred by the statute of limitation of one year;

(16) That the amended complaint does not relate back to the commencement of the suit as to this defendant, for the reason that Southern Railway Company is a foreign corporation, which does no business in Montgomery County, Alabama, by agent, so that suit could not properly have been brought against this defendant in the original complaint in said Montgomery County, Alabama;

(17) That Count One of the original complaint failed to aver any negligent Act on the part of this defendant; and it appears on the face of said complaint that the cause of action set forth in Count One, as amended, was barred by the statute of limitation at the time of filing of said amendment;

(18) That Count Two of the original complaint failed to aver any negligent act on the part of this defendant; and it appears on the face of said complaint that the cause of action set forth in Count Two, as amended, was barred by the statute of limitation at the time of filing of said amendment;

(19) That it appears on the face of said complaint that ABC Company is not one and the same as this defendant, Southern Railway Company, for the reason that ABC Company is designated and identified as the originating carrier of said tank-car, and is alleged to have had said tank-car in its possession at New Orleans, Louisiana on May 4, 1952. This defendant, Southern Railway Company, did not have said tank-car in its possession in New Orleans, Louisiana, and this defendant did not serve as the originating carrier of said tank-car;

(20) That the plaintiff has erroneously brought Southern Railway Company into this cause of action by amendment for the reason that Southern Railway Company and ABC Company are not one and the same party, inasmuch as Southern Railway Company was not the originating carrier of said tank-car, and Southern Railway Company did not have said tank-car carrier of said tank-car in its possession in New Orleans, Louisiana, as alleged in said complaint.

E. A. STEWART,
Of Counsel for Defendant,
Southern Railway Co.

PETTUS, FULLER, REEVES & STEWART,
Selma, Alabama,
and

RUSHTON, STAKELY & JOHNSTON,
Montgomery, Alabama,
Attorneys for Defendant, Southern
Railway Company.

To: Messrs. Godbold & Hobbs,
Professional Center Bldg.,
Montgomery, Alabama,
Attorneys for Plaintiff.

You will please take notice that the foregoing motion has this day been forwarded to the Clerk of the U. S. District Court for the Middle District of Alabama, Northern Division, Montgomery, Alabama, for filing, and the same will be presented to Hon. C. B. Kennamer, in Montgomery, Alabama, at such time and on such date as the Judge may designate.

Dated at Selma, Alabama, this 13th day of October, 1953.

E. A. STEWART,
Of Counsel for Defendant,
Southern Railway Company

I hereby certify that copy of the foregoing motion and notice were this day sent by U. S. Mail, postage prepaid, to plaintiff's attorneys of record, Messrs. Godbold & Hobbs, Professional Center Building, Montgomery, Alabama.

And I do hereby further certify that copy of the foregoing motion and notice were this day sent, by U. S. Mail, postage prepaid, to Hon. Evans Hinson, 26 South Perry Street, Montgomery 4, Alabama, attorney for the defendant, Atlantic Coast Line Railroad Company.

Dated at Selma, Alabama, this 13th day of October, 1953.

E. A. STEWART,
Of Counsel for Defendant,
Southern Railway Company

Filed Oct. 14, 1954.

INTERROGATORIES TO DEFENDANT SOUTHERN RAILWAY COMPANY.

(Title Omitted.)

Comes now the plaintiff and propounds the following interrogatories to the defendant Southern Railway Company.

I.

1. Is your name correctly stated in the complaint? If not, please state your correct name.

2. On May 6, 1952 were you engaged in the business of operating a railroad as a common carrier in transporting freight and passengers for hire in interstate commerce?

3. On May 6, 1952 were you a member of, or stockholder in, or associated with the Southern Railway System?

4. Is Southern Railway System a corporation? Is it an unincorporated association? If you state that it is neither, please state what type of organization Southern Railway System is.

5. Does Southern Railway System render any service for you? Does it solicit freight for you? Does it solicit passengers for you? Does it advertise your railroad? Does it make contracts for you for carriage of freight or passengers? Does it furnish information to prospective customers for you?

6. Do you make any payments to Southern Railway System for soliciting freight or passengers for you, advertising your railroad, making contracts for the carriage of freight or passengers for you or giving information to prospective customers for you?

II

7. On or about April 30, 1952, did The Bay Petroleum Corporation, Chalmette, Louisiana, request or order from you a tank car for the shipment of gasoline to Montgomery, Alabam?

8. On or about April 30, 1952 did you deliver, or furnish tank car SHPX 21336 to The Bay Petroleum Corporation?

9. If so, when did you deliver or furnish said car, to The Bay Petroleum Corporation?

10. Where did you deliver said car?

11. If you state that you did deliver said car, did you inspect the car before delivering it?

12. Please describe such inspection. Who made the inspection? Where was the inspection made? When was the inspection made?

13. If an inspection was made, did it include an inspection of the running boards near the top or dome of the tank car?

14. If you state said running boards were inspected, what did the inspection reveal? Did the inspection

reveal that the running boards were in a rotten or decayed condition?

15. Were you the orginating carrier on the shipment of a load of gasoline in tank car SHPX 21336 on or about May 1, 1952 consigned to Tan-Kar Oil Company, Montgomery, Alabama?

16. If you state you were not the originating carrier on such shipment please state who was the originating carrier.

17. Did you use or transport on your railroad lines tank car SHPX 21336 during the period April 29, 1952 to May 6, 1953.

18. If so, by whom was said tank car delivered to you? Where was it delivered to you? Please specify what city and state and what location within such city and state.

III.

19. Were any inspections of tank car SHPX 21336 ever made by you during the period of time from approximately April 29, 1952 to May 6, 1952?

20. If such inspection or inspections were made by you, when was each such inspection made?

21. Where was each such inspection made?

22. Who made each such inspection?

23. What are the names and positions of each person who made such inspection?

24. Did any such inspection or inspections include an inspection of the running boards near the top or dome of tank car SHPX 21336?

25. If you state that an inspection of said running board or boards was made, did such inspection reveal the rotten, decayed or deteriorated condition of said running board or boards?

26. If you state that an inspection of said running board or boards was made, what did such inspection reveal?

27. When tank car SHPX 21336 was delivered to you, were the running boards near the top or dome of said car in a decayed, rotten or deteriorated condition?

28. When tank car SHPX 21336 was delivered to you, in what condition were the runnings boards near the top or dome of said car?

30. If the defective condition of said running boards was found by you, did you warn plaintiff or consignee of such condition?

31. If the defective condition of said running boards was found by you and no repairs to said running board or boards were made, did you warn or notify plaintiff or consignee of tank car SHPX 21336 of such defective condition?

32. Is the inspection given all running boards on a tank car such as SHPX 21336 the same?

33. Are inspections always made on all running boards of cars when it is known persons will be using said running boards?

34. If not, why not?

35. Is the inspection given the running boards of cars delivered by another railroad to you the same as the inspection of running boards of cars delivered by you to a shipper to be loaded?

36. If such inspections are different, please state in what manner such inspections are different.

37. Why are such inspections different?

GODBOLD & HOBBS,
By TRUMAN HOBBS,
Attorney for Plaintiff.

I hereby certify that copies of the foregoing interrogatories were this day sent by U. S. Mail, postage prepaid, to Pettues, Fuller, Reeves & Stewart, Selma, Alabama and Rushton, Stakely & Johnston, Bell Building, Montgomery, Alabama, attorneys of record for defendant Southern Railway Company.

Dated at Montgomery, Alabama this the 19 day of October, 1953.

TRUMAN HOBBS,
Of Counsel for Plaintiff, W. A. Shields.

Filed Oct. 19, 1953.

(Title Omitted.)

Comes the defendant, Atlantic Coast Line Railroad Company in the above styled cause and without waiving its motion heretofore filed in this cause, files herewith its answer to the complaint of the plaintiff as amended and to each count thereof separately and severally.

I.

Defendant Atlantic Coast Line Railroad denied that it was guilty of any negligence which caused or contributed to the injuries of the plaintiff.

II.

The defendant Atlantic Coast Line Railroad denies each and every allegation of plaintiff's complaint alleging negligence on the part of defendant Atlantic Coast Line Railroad.

III.

For answer to plaintiff's complaint, defendant Atlantic Coast Line Railroad avers that it did not violate the Federal Safety Appliance Act as alleged by plaintiff in Count 1 of plaintiff's amended complaint.

IV.

Defendant Atlantic Coast Line Railroad in answer to Count 1 of plaintiff's amended complaint avers that, that part of the tank car that broke or gave

way, to-wit: The short dome step board at the top of the tank car and from which plaintiff fell and sustained his alleged injuries, was not within the purview of the Federal Safety Appliance Act and in particular was not within the purview and was not covered by Title 45, United States Code Annotated, Section 11 in that the Inter State Commerce Commission of the United States has not designated aforesaid dome step as coming under or being within the purview of the Federal Safety Appliance Act as is provided by Title 45, Section 12 of the United States Code Annotated, hence there was no violation of the said Federal Safety Appliance Act on the part of the defendant Atlantic Coast Line Railroad.

V.

For answer to plaintiff's complaint, defendant Atlantic Coast Line Railroad avers that at the time of the accident the plaintiff was not an employee of the defendant railroad and was not an employee of any other railroad and said defendant further avers that it had completed the haul or transportation of the tank car referred to in plaintiff's complaint at the time of the accident and that said tank car was being unloaded by the plaintiff at the request of and under orders of the consignee, Tan-Kar Oil Company, Montgomery, Alabama and that said Tan-Kar Oil Company had full supervison, charge and control of said tank car. Therefore its alleged violation of the Safety Appliance Act is not applicable in this case.

VI.

For answer to plaintiff's complaint, defendant Atlantic Coast Line Railroad avers that the Federal

Safety Appliance act was not applicable and that at the time and place of the accident, said act had no application.

VII.

For answer to plaintiff's complaint, defendant Atlantic Coast Line Railroad avers that it did not furnish or supply the tank car referred to in plaintiff's complaint and that said tank car was delivered to said defendant Atlantic Coast Line Railroad at Montgomery, Alabama by another railroad at Montgomery, Alabama and said defendant Atlantic Coast Line Railroad hauled said tank car as a switching carrier only from its Day Street Yard to a short bulk track, a distance of approximately 3/4 of a mile where said tank car was placed to be unloaded by the consignee and said defendant further avers that when said tank car was delivered to it here in Montgomery, said tank car was inspected by a duly qualified, competent car inspector of said defendant Atlantic Coast Line Railroad Company, which car inspector made a reasonably careful inspection of said tank car, and said inspector disclosed no defect in said car, and said defendant avers that the alleged defect in the short dome step board was a latent or hidden defect and was not discoverable through said reasonably careful inspection. Hence said defendant Atlantic Coast Line Railroad had no knowledge of said defect in said tank car and is not liable for alleged injuries of plaintiff which might have resulted from said latent defect.

VIII.

For answer to plaintiff's complaint, defendant Atlantic Coast Line Railroad avers that plaintiff himself was at the time of the accident and thereafter guilty of negligence which proximately contributed to his alleged injuries.

EVANS HINSON,
D. B. HAMILTON,
Attorneys for the defendant,
Atlantic Coast Line Railroad
Company.

A copy of these pleadings have been handed to Mr. Albert Copeland of Counsel for the Plaintiff.
Oct. 29, 1953.

EVANS HINSON,
Def's. Attorney.

Filed Oct. 29, 1953.

PLAINTIFF'S ANSWERS TO INTERROGATORIES OF THE DEFENDANT ATLANTIC COAST LINE RAILROAD COMPANY.

(Title Omitted.)

I.

1. I have been unloading tank cars off and on for approximately 20 years.

2. Yes.

3. I would look at tank cars before I unloaded them but I did not inspect them since I understood

that the railroad was supposed to inspect all cars before I was called to them.

4. I looked at the running board but did not make an inspection of it since I understood that the railroad was supposed to inspect running boards on all cars before I was called to them and furnish me a safe place to work.

5. I do not remember any defect that was apparent from a casual glance but the running board obviously was defective since it broke when I stepped on it, causing me to fall about 12 feet to the railroad track below.

6. (As previously stated, I saw no defect from a casual glance since I relied on the railroad's inspection. Obviously the running board was defective since it broke when I stepped on it.)

II.

1. Yes.

III.

1. I have been treated by the following doctors:

Dr. B. W. Cobbs, 434 Sayre Street, Montgomery, Alabama, Dr. William L. Smith, Bell Building, Montgomery, Alabama, Dr. E. J. Kocour, 822 Madison Avenue, Montgomery, Alabama, Dr. Elias N. Kaiser, 603 So. Hull Street, Montgomery, Alabama, Drs. Stickley, Moore & Reynolds, Bell Bldg., Montgomery, Alabama.

2. I was treated twice by Dr. Cobbs. The first time was on the day I was injured and the second time was two or three weeks later. Dr. Smith saw me three times. The dates of these visits according to his records were September 10, 1952, March 16, 1953, and May 5, 1953. I was X-rayed by Drs. Stickley, Moore and Reynolds on May 12, 1953 at Dr. Smith's request. I was seen by Dr. Kocour on June 1, 1953. Dr. Kocour also saw me daily in the hospital from July 20 to July 25, 1953. Dr. Kaiser also saw me in the hospital, and at Dr. Kocour's request on September 18, 28, 29, and October 14, 1953.

3. Already answered.

4 & 5. Of course, I am not a doctor and I cannot give a medical diagnosis, I can only say what I can remember of what the doctors have told me. Dr. Cobbs, the doctor from the Atlantic Coast Line, told me both times that I probably had only a bruise or a sprain. He did not take any X-rays but told me to sit in a hot bath if my shoulder, neck or arm bothered me. Dr. Smith told me that he could not tell what was wrong without X-rays. He said that it must be something inside my back, and that I had a possible strain of my spine. Dr. Kocour and Dr. Kaiser both made X-rays. Dr. Kocour told me that I might get some relief by traction treatments in the hospital. I took these treatments and while I was in the hospital Dr. Kocour and Dr. Kaiser examined me. I understand from Dr. Kaiser that I have a roughening of the 4th, 5th, and 6th cervical vertebrae, and a cervical spine sprain and a possible injury to the nerve roots of my spine. I know that my neck and arm still hurt and Dr. Kaiser has advised further treatment in the hospital.

IV.

1. Yes.

V.

1. Dr. Cobbs who is the doctor for the Atlantic Coast Line did not send me any bill. The other bills are as follows:

Dr. Smith—$10.00
Drs. Stickley, Moore & Reynolds—$25.00
Dr. Kocour—$80.00
Dr. Kaiser—$60.00

The first two bills have not been paid but I have not paid Dr. Kocour and Dr. Kaiser as yet.

2. All of these bills are for the injuries received by me when the running board broke under me and I fell onto the railroad tracks.

3. Already answered.

4. Already answered.

5. Already answered.

6. On the advice of counsel, I decline to answer this question since it calls for incompetent, immaterial and irrelevant matter.

7. I do not have any statements at the present time, however, the information given above as to the doctors bills is correct.

VI.

1. No.

VII.

1. Already answered.

VIII.

1. No, except as part of the hospital bill, when I was hospitalized for the spinal injuries received when I fell to the track.

IX.

1.-6. Already answered.

X.

1. Yes.

XI.

1. I was in St. Judes Hospital, Montgomery, Alabama from July 20 through July 25, 1953.

2. Already answered.

3. Already answered.

4. Dr. Kocour and Dr. Kaiser.

XII.

1. Yes.

XIII.

1. $78.65.

2. July 20-25, 1953.

3. I do not have the copy of the hospital bill but the amount above is correct and has been paid.

4. Already answered.

5. On the advice of my counsel I decline to answer the question because it calls for irrelevant, incompetent, and immaterial matter

XIV.

1. No.

2. Already answered.

3. Already answered.

4. Already answered.

XV.

1. The only time I have been confined to the bed was while I was in the hospital.

2. Already answered.

3. Already answered.

XVI.

1. Yes.

2. I do contract work consisting of repaid, meintenance, and installation of gasoline and oil equipment and loading and unloading gasoline and oil.

3. I work under my own name.

4. I have been in business for myself for over two years.

5. I earn $3,039.89 for 1951 and $1,218.50 the first four months in 1952.

XVII.

1. No, except for the time in the hospital and while I was being treated by the doctors.

2. Already answered.

3. Already answered.

4. Already answered.

5. Already answered.

XVIII.

1. Yes.

2. I am still doing maintenance installation and repair of gasoline equipment.

W. A. SHIELDS,
(W. A. Shields).

State of Alabama,
Montgomery County.

Before me, Albert W. Copeland, a Notary Public in and for said State at Large personally appeared W. A. Shields who having been by me first duly sworn deposes and says that the answers to the foregoing interrogatories are true and correct.

W. A. SHIELDS,
(W. A. Shields).

Sworn to and subscribed before me this 8th day of December, 1953.

ALBERT W. COPELAND,
Notary Public.

Certificate.

I hereby certify that a copy of the foregoing answers to interrogatories were sent this day by U. S. Mail, postage prepaid, to Evans Hinson, Esq., attorney of record for the defendant Atlantic Coast Line Railroad Company.

This the 8th day of December, 1953.

ALBERT W. COPELAND,
Of Counsel for Plaintiff W. A. Shields.

Filed December 9, 1953.

ORDER OVERRULING MOTION TO DISMISS.

(Title Omitted.)

The motion to dismiss, filed by the defendant Atlantic Coast Line Railroad, raises the question as to plaintiff's right to maintain this action for a violation of the Federal Safety Appliance Act, the plaintiff not being an employee or passenger of the defendant Atlantic Coast Line Railroad at the time of the alleged injury.

The United States Supreme Court in Fairport R. Co. vs. Meredith, 292 U. S. 589, answered this question as follows:

"The nature of the duty imposed by the statute and the benefit resulting from its performance usually determine what persons are entitled to invoke its protection."

In the Meredith case, the plaintiff was not an employee or passenger of the defendant railroad at the time of the injury.

In the light of the rule laid down in the Meredith case, it follows that the duty imposed upon petitioner by the provisions of the Act in respect to running boards, extends to and includes an employee of the consignee of a shipment who was allegedly injured while on the running board in the discharge of his employment.

The other propositions raised by the defendant's motion to dismiss are such as the Court deems nec-

essary to leave open for consideration and determination when the case is before the Court on its merits.

It is, therefore, ordered that the defendant's motion to dismiss the plaintiff's complaint, be, and is, overruled and denied.

This 9th day of December, 1953.

C. B. KENNAMER,
United States District Judge.

Filed December 9, 1953.

(Title Omitted.)

Comes Southern Railway Company, a corporation, one of the defendants in the above entitled cause, and answers the following interrogatories heretofore propounded to said defendant by the plaintiff, and for answer to said interrogatories, said defendant says:

1. Southern Railway Company is the correct name of this defendant.

2. Yes.

3. On May 6, 1952, and at the present time, Southern Railway Company was and is a corporation, incorporated under the laws of Virginia, Southern Railway Company, together with several other separate and distinct railroad corporations, compose what is known for convenience as "Southern Railway System".

4. Southern Railway System is neither a corporation, a partnership nor an unincorporated association. Southern Railway System is a trade name only. It is not a legal entity and has no legal existence as such. The name, Southern Railway System is used for convenience in designating certain affiliated corporations which operate lines of railroad.

5. Southern Railway System is not a legal entity, and the answer to each separate part of Interrogatory No. 5, is no.

6. Southern Railway System is not a legal entity, and the answer to each separate part of Interrogatory No. 6, is no.

7. No.

8. No.

9. See answer to Interrogatory No. 8.

10. See answer Interrogatory No. 8.

11. See answer to Interrogatory No. 8.

12. See answer to Interrogatory No. 8.

13. See answer to Interrogatory No. 8.

14. See answer to Interrogatory No. 8.

15. No.

16. According to the information secured by the Southern Railway Company the movement of the car

in question was as follows: tank car No. SHPX 21336 was shipped by the Bay Petrol Corporation from New Orleans, Louisiana, consigned to Tankar Oil Company, Montgomery, Alabama. The car was picked up at the plant of the Bay Petrol Corporation by the New Orleans Terminal Company and moved by that company to the Oliver Yards in New Orleans, Louisiana, and made up into a train by that Company. The car moved from New Orleans, Louisiana, under waybill No. 22454, dated April 30, 1952. This waybill was issued by the New Orleans and Northeastern Railroad Company. The car was routed and moved from New Orleans, Louisiana, to Meridian, Mississippi, over the lines of the New Orleans and Northeastern Railroad Company, arriving in Meridian, Mississippi, on May 2, 1952. The car was routed and moved from Meridian, Mississippi, to Akron, Alabama, over lines of The Alabama Great Southern Railroad Company. The car was delivered by The Alabama Great Southern Railroad Company to the Southern Railway Company at Akron, Alabama, on the night of May 2, 1952. The car was routed and moved over lines of the Southern Railway Company from Akron, Alabama, to Selma, Alabama, arriving at Selma, Alabama, on the morning of May 3, 1952. The car was delivered at Selma, Alabama, by Southern Railway Company to the Western Railway of Alabama on May 3, 1952. The car was routed and moved from Selma, Alabama, to Montgomery, Alabama, by the Western Railway of Alabama.

17. Yes. From Akron, Alabama, to Selma, Alabama.

18. Said tank car was delivered to Southern Railway Company on May 2, 1952, at Akron, Alabama, by The Alabama Great Southern Railroad Company.

19. Yes.

20. May 3, 1952.

21. At Selma, Alabama.

22. Inspections were made at Selma, Alabama, by J. B. Rucker, C. S. Shoults and C. N. Hopper, Car Inspectors, all of Selma, Alabama.

23. See answer to Interrogatory No. 22.

24. Yes, the inspectors made a visual inspection from the ground.

25. The inspection did not reveal any rotten, decayed or deteriorated running board on this car; and this defendant had no knowledge as to any running board on said car having been in any rotten, decayed or deteriorated condition at such time.

26. See answer to Interrogatory No. 25.

27. See answer to Interrogatory No. 25.

28. See answer to Interrogatory No. 25.

30. See answer to Interrogatory No. 25.

31. See answer to Interrogatory No. 25.

32. Defendant does not understand this question, and therefore cannot answer the same unless it is clarified.

33. See answer to Interrogatory No. 32.

34. —

35. See answer to Interrogatory No. 32.

36. See answer to Interrogatory No. 32.

37. —

SOUTHERN RAILWAY
COMPANY,
By J. B. GRIFFIS.

The State of Alabama,
The County of Jefferson.

Before me, the undersigned authority, in and for said County, in said State, this day personally appeared J. B. Griffis, who is known to me, and who, being by me first duly sworn, on oath, deposes and says:

That he is District Claim Agent of Southern Railway Company, a corporation, one of the defendants in the above entitled cause, and that his name as such official of the defendant corporation is signed to the foregoing answers to interrogatories, which said answers are made by and on behalf of said defendant corporation; that affiant is an official cognizant of the facts, and competent to testify to the facts, and the foregoing answers are true and correct, according

to affiant's knowledge, information and belief, which information affiant verily believes to be true.

J. B. GRIFFIS.

Sworn to and subscribed before me this 28 day of December, 1953.

PAUL E. SWANSON,
Notary Public.

(Seal)

I hereby certify that I have this day mailed, postage prepaid, copy of the foregoing answers to interrogatories to Messrs. Godbold & Hobbs, Professional Center Bldg., Montgomery, Alabama, plaintiff's attorneys of record.

And I do further certify that copy of the foregoing answers to interrogatories will be furnished to Hon. Evans Hinson, 26 South Perry Street, Montgomery 4, Alabama, attorney for the defendant, Atlantic Coast Line Railroad Company.

Dated at Selma, Alabama, this 31st day of December, 1953.

EDGAR A. STEWART,
Of Counsel for Defendant,
Southern Railway Company.
RUSHTON, STAKELY & JOHNSTON,
Montgomery, Alabama.
PETTUS, FULLER, REEVES & STEWART,
Attorneys for Defendant,
Southern Railway Company.
Selma, Alabama.

Filed Jan. 2, 1954.

(Title Omitted.)

To the Honorable C. B. Kennamer, Judge of Said Court:

Comes Southern Railway Company, a corporation, one of the defendants in the above entitled cause, by and through its attorney, and hereby moves the Court to enter summary judgment for this defendant, Southern Railway Company, in accordance with the provisions of Rule 56 (b) and (c) of the Rules of Civl Procedure, on the ground that the pleading on file in this cause and the affidavits hereto attached of J. B. Griffis and John B. Hyde, and marked Exhibits "B" and "C", respectively, show that there is no genuine issue as to any material fact between the plaintiff and this defendant, Southern Railway Company, and that the defendant, Southern Railway Company, is entitled to judgment as a matter of law;

This motion for summary judgment is being made by this defendant without waiving this defendant's motion to dismiss the complaint heretofore filed in this cause; and this defendant refers the Court to the two affidavits hereto attached in support of grounds (19) and (20) of Section C, of this defendant's said motion to dismiss the complaint.

Respectfully submitted,
EDGAR A. STEWART,
Of Counsel for defendant,
Southern Railway Company.

PETTUS, FULLER, REEVES & STEWART,
Selma, Alabama: And
RUSHTON, STAKELY & JOHNSTON,
Montgomery, Alabama,
Attorneys for Defendant, Southern
Railway Company.

To: Messrs. Godbold & Hobbs,
Professional Center Building,
Montgomery, Alabama,
Attorneys for Plaintiff:

Please take notice that the defendant, Southern Railway Company, will bring the foregoing and attached motion for a summary judgment on for hearing before Judge C. B. Kennamer, at the U. S. Courthouse at Montgomery, Alabama, at such time as the Court may designate, and that said motion will be submitted at such time upon the pleading and affidavits attached to said motion.

Dated At Selma, Alabama, this 31st day of December, 1953.

EDGAR A. STEWART,
Of Counsel for defendant,
Southern Railway Company.

I certify that I have this day mailed a copy of the foregoing motion with affidavits attached therto, to Messrs. Godbold & Hobbs, Professional Center Building, Montgomery, Alabama, plaintiff's attorneys.

I further certify that I have this day forwarded copy of the same to Hon. Evans Hinson, Attorney for the defendant, Atlantic Coast Line Railroad Company.

Dated at Selma, Alabama, this 31st day of December, 1953.

EDGAR A. STEWART,
Of Counsel for defendant,
Southern Railway Company.

Filed Jan. 2, 1954.

EXHIBIT "B".

(Title Omitted.)

The State of Alabama,
Jefferson County.

Before me, the undersigned authority, in and for said County, in said State, this day personally appeared J. B. Griffis, who is known to me, and who,

being by me first duly sworn, on oath, deposes and says:

My name is J. B. Griffis. I am employed by Southern Railway Company as District Claim Agent, and have been so employed for more than ten years past. My headquarters are in Birmingham, Alabama. My duties consist, among other things, of the investigation of personal injury and property damage claims against Southern Railway Company, within my territory in the State of Alabama. In the course of my duties as such District Claim Agent, I have had occasion to investigate the routing of tank car No. SHPX 21336, from New Orleans, Louisiana, to Montgomery, Alabama, in May, 1952, which said tank car and the routing thereof, is referred to in the plaintiff's amended complaint in this cause. Said tank car No. SHPX 21336 was shipped by the Bay Petrol Corporation, from New Oreleans, Louisiana, consigned to Tankar Oil Company, Montgomery, Alabama. The car was picked up at the plant of Bay Petrol Corporation by the New Orleans Terminal Company and moved by that Company to the Oliver Yards. The car was made up in a train by the New Oreleans Terminal Company. The car moved from New Orleans, Louisiana, to Montgomery, Alabama, under waybill 22454, dated April 30, 1952. This waybill was issued by the New Orleans and Northeastern Railroad Company. A true and correct copy o the waybill is attached hereto. The car was routed and moved over the lines of the New Orleans and Northeastern Railroad Company from New Orleans, Louisiana, to Meridian, Mississippi, arriving in Meridian on May 2, 1952. The car moved from Meridian, Mississippi on May 2, 1952 over lines of the Alabama Great Southern Railroad

Company to Akron, Alabama. The car was delivered to Southern Railway Company at Akron, Alabama on the night of May 2, 1952, and moved over lines of Southern Railway Company from Akron, Alabama, to Selma, Alabama, arriving at Selma on the morning of May 3, 1952. The car was delivered at Selma, Alabama, by Southern Railway Company to Western Railway of Alabama, on May 3, 1952, for delivery at destination. I know of my own knowledge that Southern Railway Company owns no tracks, and maintains no lines, and operates no trains into New Orelans, Louisiana. I further know of my own knowledge that it was a physical impossibility for Southern Railway Company to have had tank car No. SHPX 21336 in its possession at New Orleans, Louisiana, as alleged in plaintiff's amended complaint in this cause, and that it was a physical impossibility for Southern Railway Company to have served as the originating carrier of said tank car, as alleged in said amended complaint.

J. B. GRIFFIS,
(J. B. Griffis).

Sworn to and subscribed before me by J. B. Griffis, on this 28 day of December, 1953.

PAUL E. SWANSON,
(Seal) Notary Public, Jefferson
County, Alabama.

535. New Orleans and Northeastern Railroad Company-535 Form 2262.

Dangerous
Freight Waybill

To be used for single consignments, carload and less carload.

Car Initials and number, SHPX 21336.
Date 4-30-52.
Waybill No. 22454.
To Station, State, Montgomery, Ala.
From No. 8826.
Station, State, New Orleans, La.
Route Mdn Ags Sou Selma W of A Montg ACL Bell St. Siding.
Full name of shipper and C.O.D. Shipments, the Street and Post Office Address and Invoice if available, The Bay Petroleum Corp., Ex Not Co ALB.

Consignee and Address, Tankar Oil Co:

On C. L. Traffic Instructions. (Dangerous).

Description of articles, special marks and exceptions	Weight	rate	Freight
			183.36
8171 Gals Gasoline	53929	34	11.00
		LC 6% Tariff	194.36

Dome Even
Dangerous Placards Applied
Sic

Copy

535—New Orleans and Northeastern Railroad Company—535

EXHIBIT "C".

AFFIDAVIT.

(Title Omitted.)

John B. Hyde, being first duly sworn, deposes and says that he is a Vice President of Southern Railway Company, a Virginia corporation.

Affiant deposes and says further that the name Southern Railway System is a trade name only, is not a legal entity, has no legal existence as such, and is used for convenience in designating certain affiliated companies operating lines of railroad; that the companies composing Southern Railway System and the miles operated by each are as follows:

	Miles Operated	Incorporated under the Laws of:
Southern Railway Company	6,299.23	Virginia
The Cincinnati, New Orleans and Texas Pacific Railway Company	336.72	Ohio
The Alabama Great Southern Railroad Company	326.25	Alabama
New Orleans and Northeastern Railroad Company	203.14	Louisiana
Georgia Southern and Florida Railway Company	396.91	Georgia
Together with the following short line companies with a total mileage of 51.10:		
Harriman and Northeastern Railroad Company	18.82	Tennessee
New Orleans Terminal Company	19.01	Louisiana
St. Johns River Terminal Company	13.27	Florida

Affiant deposes and says further that all of the said companies composing Southern Railway System are operated separate and part from each other; that they file separate reports with the Interstate Commerce Commission and with the public service commissions of the states in which they respectively operate; that they file separate federal and state income tax returns; that they keep separate books of account, pursuant to the accounting regulations of the Interstate Commerce Commission, have separate employees, and maintain individual payrolls; that their treasuries and funds are separate; that each issues its own securities and incurs its own debts; and that the physical operation of each is entirely separate and apart from that of the others.

JOHN B. HYDE.

Sworn to and subscribed before me by John B. Hyde on this 12th day of December, 1953.

HOBART R. HOUSE,
(Hobart R. House),
Notary Public, District of Columbia.

(Seal)

My commission expires November 15, 1956.

(Title Omitted.)

To the Honorable C. B. Kennamer, Judge of said Court:

Comes Southern Railway Company, a corporation, one of the defendants in the above entitled cause, by and through Edgar A. Stewart, of Counsel, and with leave of Court heretofore granted, files affidavit

of Elmore A. Evers, hereto attached and marked Exhibit "A". Said affidavit is being filed herewith in support of this defendant's motion to dismiss the complaint heretofore filed in this cause, and specifically in support of Section B, of said motion to dismiss the complaint.

EDGAR A. STEWART,
Of Counsel for defendant,
Southern Railway Company,
a corporation.

I hereby certify that I have this day mailed a copy of the foregoing statement, together with affidavit attached, to Messrs. Godbold & Hobbs, Professional Center Building, Montgomery, Alabama, plaintiff's attorneys, and also have mailed copy of the same to Hon. Evans Hinson, Attorney for the defendant, Atlantic Coast Line Railroad Company.

Dated at Selma, Alabama, this 31st day of December, 1953.

EDGAR A. STEWART,
Of Counsel for defendant,
Southern Railway Company,
a corporation.

Filed Jan. 2, 1954.

EXHIBIT "A"

(Title Omitted.)

The State of Alabama,
Montgomery County.

Before me, the undersigned authority, in and for said County, in said state, this day personally appeared Elmore A. Evers, who is known to me, and who, being by me first duly sworn, on oath, deposes and says:

My name is Elmore A. Evers. I reside at 1930 Bullard Street, Montgomery, Alabama. I am employe by Southern Railway Company, as District Freight and Passenger Agent, with headquarters in Montgomery, Alabama. I have been employed in this capacity as District Freight and Passenger Agent since March, 1952. From 1947 to March, 1952, I was employed as Commercial Agent for Southern Railway Company with headquarters in Montgomery.

Southern Railway Company is a corporation, organized under the laws of the State of Virginia. It is qualified to do business within the State of Alabama, owns tracks and properties within the State of Alabama, and does business in various parts of the State of Alabama. Southern Railway Company owns no tracks, maintains no lines, and operates no trains within Montgomery County, Alabama.

Southern Railway Company has for a number of years past rented an office at 923-925 First National Bank Bldg., Montgomery, Alabama. The tlephone is listed in the Montgomery Telephone Directory under

the name of "Southern Railway System", and "Southern Railway System" is printed on the entrance to the office there, and also shown in the lobby directory on the first floor of the building. We also have a post office box in Montgomery. The physical equipment in the office consists solely of office furniture, fixtures and supplies. This physical equipment is the property of Southern Railway Company, and so far as I know, this is the only property which Southern Railway Company owns in Montgomery County, Alabama. In addition to myself, there are only two other employees of Southern Railway Company in Montgomery. One is the "Commercial Agent", Mr. L. H. McWhirter, and the "Chief Clerk", Mr. W. E. Sargent. The Commercial Agent is directly under my supervision, with headquarters in Montgomery, and he resides in Montgomery; but all of his activity on behalf of Southern Railway Company is in counties other than Montgomery County. The Chief Clerk performs general clerical and office duties under my direction and supervision.

My principal and primary duties, as District Freight and Passenger Agent, consist in the solicitation of freight and passenger business from customers residing within my territory for shipment and carriage on Southern Railway Company and affiliated lines. In addition to Montgomery County, my territory consists of portions of thirty-one (31) other counties in Southeast Alabama. Southern Railway Company operates no lines in any part of my territory. I personally solicit business, both freight and passenger, in Montgomery County and in several other counties within my territory. Mr. McWhirter, the Commercial Agent, handles the solicitation of business

in the remaining counties within the territory. My immediate superior is Mr. L. E. Wetterau, Executive General Agent, with headquarters and offices in Birmingham, Alabama. Mr. Wetterau has complete authority as to all operations of my office in Montgomery. I have no authority to hire or fire employees, and have never hired or fired any employees in the office. All such authority is, and always has been given by Mr. Wetterau and his superiors. Southern Railway Company maintains no bank account in Montgomery, and maintains no cash funds in Montgomery. My office handles no monetary transactions. The rent, all salaries and all purchases in excess of $10.00, are paid by drafts or vouchers from Southern Railway Company's executive offices. My office is only authorized to make miscellaneous purchases of less than $10.00.

I act as a sales representative for Southern Railway Company, and I endeavor to get shippers within my territory, including Montgomery County, to route traffic via Southern Railway Company and affiliated lines, on shipments originating or terminating in Montgomery County. Also, my duties consist of soliciting passenger business via Southern Railway Company and affiliated lines.

My employees and I investigate any complaints which we may receive as to service, but I do not have, and neither of my employees has, authority to settle or compromise claims for damages and we do not settle or compromise claims for damages or claims arising from any other cause. Whenever I overcharge or undercharge, I transmit it on to the propriate Claim Department. If the claim involves

vercharege or undercharge, I transmit it on to the tlanta, Georgia office. If the claim involves loss or damage, I transmit it for handling to the Chattanooga, Tennessee office. After the claims are transmitted by me to these offices, the claims are then handled to conclusion by the respective offices. Southern Railway Company neither receives for shipment, nor accepts for delivery, in Montgomery County, any freight nor does it carry any passengers within Montgomery County, Alabama. Neither I nor my employees, make any physical inspection of damaged goods received in Montgomery. In any claims involving overcharges and other claims where good customer-relations necessitate, I do discuss claims with customers. On the other hand, I am not authorized to compromise any claims.

No original bills of lading are issued by Southern Railway Company in Montgomery County, Alabama, and none have ever been issued since 1952. So far as I know, none were ever issued for the period from 1947 to March, 1952. I do, from time to time, receive request for reconsignment, where there is a change either in consignee or destination, or both. When such requests are received, I transmit the request to the appropriate office of Southern Railway Company or other line for execution. In connection with these reconsignments there are occasional instances when customers desire exchange bills of lading and when requested by our customers we issue these exchange ladings in my office in Montgomery, upon surrender of the original bill of lading.

I transmit billing instructions, either by wire or phone, to the appropriate office of Southern Railway Company in order to have customers shipments billed

in accordance with their requests. I also request, from time to time, placement of equipment on Southern Railway Company and affiliated lines, in accordance with customers' request. In order to better serve our customers, I frequently request that freight shipments be given expeditious handling, but I have no authority to assure customers either expeditious or preferential handling.

My office does not sell any passenger tickets and we have no authority to sell passenger tickets of any type. We do not purchase, and have no authority to purchase tickets from Southern Railway Company or other railroads for passengers. On request of a customer, we do arrange for reservations, either from Montgomery or from other points, and both on Southern Railway Company lines and on lines of other railroads. If the customer wishes us to transmit his money for tickets, we will accept the customer's check or its equivalent, transmitting the same to the General Passenger Agent, Birmingham, Alabama, with the request that such tickets be purchased in accordance with customer's instructions. When such tickets have been acquired by the passenger agent in Birmingham, they are either sent to me for delivery to the customer, or delivered direct to the customer, as requested.

I do not have authority to direct, and I have never directed, that any train be stopped at non-scheduled times or places for taking on or discharging either passenger or freight. I have never issued, and have never had authority to issue, any orders for the actual operations of trains of Southern Railway Company or any other railroad Company.

The foregoing constitutes a complete statement of the activities of Southern Railway Company in Montgomery County, Alabama, and a complete statement of my authority, and the authority of the two employees in my office. The foregoing facts have existed throughout the entire period since I have held my present position, viz: March, 1952. Such facts were in existence during the entire month of May, 1953, and have existed since May, 1953, up to and including the present time.

ELMORE A. EVERS,
(Elmore A. Evers).

Sworn to and subscribed before me by Elmore A. Evers, on this the 1st day of December, 1953.

ALBERT D. KOHN,
(Notary Seal) Notary Public, Montgomery, Alabama.

My commission expires: Nov. 18, 1956.

Deposition of Mr. E. A. Evers.

In the District Court of the United States for the Middle District of Alabama, Northern Division.

Montgomery, Alabama
February 8, 1954

W. A. Shields, Plaintiff,
vs. Cviil Action No. 896-N.
Atlantic Coast Line R. R., and The Southern Railway Company, Defendants.

Appearances:

Mr. John Godbold, Attorney for Plaintiff, Montgomery, Alabama.

Mr. Edgar Stewart, Attorney for Southern Railway, Selma, Alabama.

Mr. Evans Hinson, Attorney for Coast Line Railroad, Montgomery, Alabama.

Col. Marion Rushton, Attorney for Southern Railway, Montgomery, Alabama.

Filed Jun. 14, 1952.

MR. E. A. EVERS, called as a witness, being duly sworn by Judge Kennamer, testified as follows:

Direct Examination.

By Mr. Godbold:

Q. Give us your name, please?

A. Elmore A. Evers.

Q. Where do you live?

A. 1930 Bullock Street, Montgomery, Alabama.

Q. How long have you been living here?

A. Since January 1, 1947. My residence here has not been that long.

Q. How long have you been an employee of the Southern Railway Company or the Southern Railway System?

Mr. Stewart:

I object to the form of the question.

The Court:

Do you know what the distinction is between the Southern Railway Company and the Southern Railway System?

A. I do not know.

Q. Is there a distinction?

A. My pay check is from the Southern Railway Company. This other matter I do not know.

Mr. Godbold:

Q. Since 1947 you have been employed by the Southern Railway Company?

A. Yes, sir.

Q. Since 1947 what has been your job with the Southern Railway Company as you put it?

A. I am a sales and service officer, it is purely that. It is a solicitation of freight and passenger service.

Q. You sell a service, and you try to sell good service for your office, do you not?

A. That is right.

Q. The Southern Railway Company owns trackage and operates in this state, does it not?

A. Yes, sir.

Q. But the Southern Railway Company does not run tracks into Montgomery, does it?

A. No, sir.

Q. I wil ask you whether or not you know if the Southern Railway Company is qualified as a company to do business in the state?

A. I do not know.

Mr. Stewart:

We admit that.

The Court:

As the Southern Railway Company?

A. Yes, sir.

Mr. Godbold:

Q. Do you have an office down here in the First National Bank Building?

A. That is correct.

Q. I will ask you what is the sign on the door?

A. Southern Railway System.

Q. There is an emblem of some kind on the door?

A. Yes, sir.

Q. I wonder if you would describe that emblem?

A. It is a round emblem and has Southern Railway System on it in the middle.

Q. Is that emblem in general use as an emblem of the Southern Railway Company?

A. I don't ever recall having seen that.

Q. Does the name Southern Railway Company appear on your door?

A. No, sir.

Q. What is the name that appears on the building?

A. Southern Railway System.

Q. Does the name Southern Railway Company appear there?

A. No, sir.

Q. Is this emblem formed in the way of a map or a drawing?

A. No, it is a round emblem and has Southern Railway System on it, in gold and blue letters on the door.

Q. How long has that office been maintained, Mr. Evers, do you know?

A. I do not know.

Q. It has been there at least since 1941?

A. Yes, sir.

Q. Has the emblem and the designation of that office all that time been Southern Railway System or Southern Railway Company?

A. I could not say except since 1947.

Q. Since 1947 has it been so designated?

A. That is right.

Q. Who pays the rent?

A. The Southern Railway Company.

Q. How is that paid?

A. By voucher.

Q. How is the voucher handled?

A. I make a voucher out in my office and forward it through our usual channels, it goes to Washington and then comes back to the Bank.

Q. What are your usual channels?

A. I forward it to Birmingham, the home office, to L. E. Watteraw, Executive General Agent in Birmingham.

Q. He is Executive General Agent of what?

A. I can't say whether it is the company or the system I don't now.

Q. Have you ever been in his office in Birmingham?

A. Yes.

Q. What is on his door?

A. I can't recall that he has any emblem.

Q. Do you recall how it is listed in the building directory?

A. I do not know.

Q. After you forward the voucher for your rent to Birmingham, it goes from there to where as far as you know?

A. I am not positive but I assume it goes to Cincinnati and the nto Washington.

Q. What office is in Cincinnati? Who is up there?

A. Mr. C. W. Gough.

Q. Is that the System or the Company?

A. I do not know.

Q. Is Washington the System or the Company?

A. I do not know.

Q. Have you ever seen a copy of your lease from the First National Bank?

A. I do not recall.

Q. Do you have that in your file?

A. Yes.

Q. Who owns the furniture in your office?

A. As far as I know it belongs to the Southern Railway Company.

Q. You are not sure?

A. No.

The Court:

If I understand the witness correctly, he doesn't know of any distinction between Southern Railway

Company and Southern Railway System. As far as your knowledge goes, it is one the same thing?

A. I don't know.

Mr. Godbold:

Q. I want to ask you if you know of any distinction?

A. My work is purely sales work. We are not only, in our sales work we sell Southern Railway Company or System and we sell throughout the lines, from New York to New Orleans and to the B & O as well as other lines. My work is purely sales work, as to the distinction between the two companies, I have never given it any thought.

Q. Getting down to what the Judge was asking you about, your affidavit said, "My duties consist in the solicitation of freight and passenger business from customers residing within my territory for shipment and carriage on Southern Railway Company and other affiliated lines" Are the lines affiliated in the System?

A. That is correct.

Q. That includes the Northeastern and New Orleans Terminal Cmpany does it not?

A. Yes.

Q. I believe your affidavit says, "I act as sales representative of the Southern Railway Company, and I endeavor to get shippers to route traffic by the Southern Railway Company and affiliated lines" That is the System?

A. That is what I said, if the system lows lines we connect with.

Q. Are you affiliated with other lines you connect with from a sales view point?

A. Yes.

Q. But getting down to facts, they are affiliated with lines in other systems are they not?

A. That would be correct.

Q. Your listing in the City Directory for your office is Southern Railway System, is it not?

A. That is right.

Q. And in the City Directory your office is listed as the Southern Railway System?

A. I could not answer that.

Mr. Stewart:

It is listed that way.

Mr. Godbold:

You admit that it is listed that way?

A. Yes, sir.

Q. Is your affidavit, Mr. Evers, you stated it was listed that way. What means of communication do you have there in your office?

A. We have a telephone and the TWX Teleprinter.

Q. What office does the TWX connect with?

A. With the TWX Teleprinter in Birmingham.

Q. That is the Birmingham office. You state that you don't know whether it is The Southern Railway system or the Southern Railway Company?

A. That is right.

Q. What does Birmingham have connection with; do you know?

A. On our lines we have a complete net-work of telephones, whether they continue beyond Birmingham I don't know.

Q. What do you mean by on your lines?

A. Points where we have depots of the Southern Railway Company.

Q. You state in your affidavit: "When we receive claims I refer them for handling to the appropriate Claim Department." What do you mean by that?

A. If it is a claim relating to overcharge or undercharge, or a rate matter, it would go to our claims people in Atlanta, Georgia. If it is a loss or damage claim, it does to Chattanooga, Tennessee. All Claims that come through my office are referred to one of these.

Q. Let us, assume, Mr. Evers, that there was a dispute about the rate on this particular shipment in which the consignee was Tank Kar Oil Company, was it not?

A. That is right.

Q. Suppose there was a dispute—First let me ask you this: Can you tell what this document is?

A. That is an original of a uniform straight bill of lading.

Q. Issued by whom?

A. It indicates it was issued by the Northeastern Railway.

Q. That is one of the affiliated lines?

A. Yes.

Q. Where was that issued? At what point was that issued, Mr. Evers?

A. It shows New Orleans, Louisiana.

Q. We would like to offer this in evidence.

(Received and marked Plaintiff's Exhibit No. 1.)

Assuming, Mr. Evers, that there was a complaint about the rate on this bill of lading. Assuming that Tank-Kar Oil Company complained to you that the rate was improper, you would refer that complaint to where?

A. I would refer them to the Western Railway of Alabama.

Q. You would not refer them to your claims department?

A. No.

Q. What complaints are you talking about when you say, we refer complaints on rates to the appropriate Claim Department, which I believe would be in Atlanta?

A. That is when a shipper has filed a claim and it is sent to me for transmission.

Q. Suppose the Tank Kar Oil Company filed a claim alleging it had been overcharged on the rate, what would you do?

A. If he filed the claim with me I would make an investigation to see if he had been overchaged.

Q. I see. What would happen then?

A. I would send the file papers to Atlanta, Georgia.

Q. Do you know what Atlanta, Georgia, would do?

A. I do not know.

Q. Where are these charges, with respect to this claim, computed Where were these charges originally computed, Mr. Evers?

A. That is not clear.

Q. When this shipment we are concerned with came into Montgomery, somebody had computed that Tank Kar Company so many dollars?

A. That was made in Montgomery.

Q. Is that made on all shipments coming into Montgomery?

A. The delivering line should make that computation.

Q. Is that true of all shipments? How about f.o.b.?

A. That has no relation to it. The different lines should assess proper charges.

Q. I believe you state in your affidavit where you have claims for overcharges and other claims where good customer-relations necessitate you do discuss that claim here in Montgomery?

A. That is right.

Q. If the claim involved loss or damage to goods and you think good customer relations require—

A. No, we discuss it.

Q. Not on loss or damage?

A. Yes.

Q. You do discuss it as a matter of good relations?

A. That is right.

Q. Actually a large part of your duty is selling customers and talking with them and trying to persuade them that it is in their interest to ship over Southern Railway Company and its affiliated lines?

A. Yes.

Q. You are selling a service. From time to time you receive a request for re-consignment, either consignee or destination?

A. That is right.

Q. If a consignee requests you to make a charge or a reconsignment of it, what do you do with that request for reconsignment?

A. We pass that request on to our operating people.

Q. Who do you mean by operating people?

A. It all depends on where the car is.

Q. Let's assume a shipment is traveling over North eastern and New Orleans and the consignee is in Montgomery and that consignor requests you to make a reconsignment of that car, what would you do?

A. It would depend on what he wanted it consigned to.

Q. Let's assume it was consigned to New Orleans, Louisiana.

A. I would pass that on the Northeastern.

Q. At times there are exhcnage bills of lading to be issued, and then it is necessary for new bills of lading to be issued?

A. No, it is not necessary but at times desirable.

Q. Your office issues those exchange bills of lading, do they not?

A. That is right.

Q. Is that done on a particular form?

A. It is just a customary form, the regular bill of lading form.

Q. When you issued that what is it called, is that an exchange bill of lading?

A. We take up the original bill of lading and issue the other.

Q. Do you know that is done?

A. That is right

Q. What authority or action does your office take with regard to billing instructions? What the agent shall be billed for a shipment?

A. We do not have any authority on that. You are speaking of charges? Asessing freight bills we have nothng to do with that.

Q. I refer you to your affidavit. "I transmit billing instructions, either by wire or by phone, to the appropriate office of Southern Railway Company in order to have customers shipments billed in accordance with their request."

A. I misunderstood your question. Yes, they issue the shipping instructions. I mean I myself issue shipping instructions if a customer whom we know is in Montgomery and he is loading a car for the Southern Railway, I pass these instructions to the billing agent. We transmit that.

Q. Let's take the same car we were referring to a moment ago. And that consignee requests you to have that billed in a certain way. How would they trace that information?

A. I would transmit it to the shipper.

Q. If he had requested it to be on some line? The answer is Northeastern?

A. The answer is Northeastern, that is right. We do not order. We request shipments.

Q. They comply with your request?

A. Yes.

Q. There is a distinction there, they could say you can't do that?

A. I tell the customer, you have to act from that end.

Q. Now, from time to time you request placement of equipment at certain points of the Southern Railway Company and affiliated lines, do you not?

A. That is not a request. That is right.

Q. On the lines of Northeastern you could request a shipment be placed on a certain siding to be reloaded?

A. That is right. You don't order that.

Q. But you ask for it?

A. That is right.

Q. In most cases that request is honored?

A. I would say yes.

Q. Sometimes you make a request for more expeditious handling of freight shipments?

A. That is right.

Q. I want to ask you about your ticket selling in your office. You don't sell tickets, do you?

A. No. If a customer asks for it.

Q. If a customer requests a reservation which takes him over the Southern Railway Company and affiliated lines, you fill that request for reservations, do you not?

A. Yes.

Q. How?

A. By wire or by letter. It depends upon where and to whom it goes.

Q. Do you communicate that to company or your service officers or other lines. Suppose I come in your office down here and wanted you to purchase a ticket for me to some point on the Southern Railway System and gave you the purchase price of this ticket, what would you do?

A. I would not take the money. I would not take cash. I would ask for a check and I would send it to Birmingham and they would send the ticket to you.

Q. Then you would send it to Birmingham?

A. That is right.

Q. The office in Birmingham sends the tickets sometimes to the customers, and sometimes to you?

A. Just as I ask them to do.

Q. At times do you send the money or funds and then deliver it to the customer?

A. That is right.

Q Mr. Eyers, how many employees are there down here in this Southern Railway System office?

A. Three.

Q. You are paid directly from the home office of Southern Railway Company?

A. Yes.

Q. How are you paid? Do you send them the pay-roll vouchers?

A. No. It just comes automatically.

Q. Are you under their pension plan?

A. Yes.

Q. In round figures about what does your total monthly payroll run?

A. About $1200.00.

The Court:

It looks like we are getting into immaterial details.

Mr. Godbold:

Q. How are your expense accounts handled, Mr. Evers?

A. We have two employees on expense accounts.

Q. How do you handle them?

A. We send them to the General Agent in Birmingham.

Q. Do any employees use automobiles?

A. Yes, two of them.

Q. Are they registered in your name?

A. Yes.

Q. Do you draw expenses for using these automobiles?

A. We draw gas and oil.

Q. Do your employees have passes?

A. Yes.

Q. Over what route, or lines, are these passes issued for?

A. All over the Alabama lines.

Q. Every line in the State of Alabama?

A. Every line serving Montgomery.

Q. Do they cover other affiliated lines of the Southern System?

A. We have a Southern Railway pass and an LN & N.

Q. Do you have your Southern Pass?
A. Yes.

Mr. Godbold:
If Your Honor please, we would like to offer this pass in evidence with leave to substitute a photostatic copy later.

(Received and marked Plaintiff's Exhibit No. 2 or Deposition.)

Q. This is a Southern Railway pass, and it is signed by D. W. Brodnan, Vice President. Do you know this man, D. W. Brodnan, Mr. Evers? He is Vice President of what?
A. He is Vice President of the Southern Railway Company.
Q. We are going to have to keep this pass until we get a substitute.
A. All right.
Q. Your Vice President is a man in Birmingham, Mr. Evers?
A. That is right.
Q. Now how often do your superiors of the Southern Railway System or Southern Railway Company come here to Montgomery to visit your office?

Mr. Stewart:
Q. Please specify which?

Mr. Godbold:
Q. Oh, officers of the Southern Railway Company, how often do they come here and visit your office and check with you and inspect your operations?

A. Mr. L. E. Wetterau comes here from Birmingham.

Q. How many times a year?

A. Once every three months.

Q. He stays how long?

A. A day or more.

Q. In handling freight what function does your office perform in taking of loss claims. Suppose a customer said, "My shipment of freight has not arrived?"

A. Yes, we would trace it, by letter or by wire.

Q. By letter or by wire to whom?

A. It would be over a stepping stone proposition, from the customer to the point from which he thought it had moved.

Q. Do you solicit outgoing traffic?

A. We solicit both.

Q. You actually solicit and receive business which is shipped right into Montgomery?

A. They come to Montgomery, yes.

Q. They come on through a bill of lading, and on the same car, all the way, do they not?

A. Yes.

Q. Do Southern freight cars come into Montgomery although not on a Southern track?

A. Yes.

Q. How about passenger cars?

A. Yes.

Q. How would Southern passenger cars come into Montgomery?

A. They are handled by the Western Railway of Alabama, and the West Point Route.

Q. How would that happen?

A. The Crescent operates from New Orleans to New York, jointly.

Q. Would Southern Railway Company have to pay Western of Alabama for handling cars through here?

A. That is right.

Q. It stops here in the station?

A. That is right.

Q. How about Pullman cars?

A. I don't know about Pullman cars.

Q. Does the Southern Railway Company or Southern Railway System have any special freight service, where the consignee gets a report?

A. We have no automatic reports.

Q. Suppose I requested monitoring service on a car bound for NO and NE would your office furnish me that information?

A. They would.

Q. They keep you posted as to its progress?

A. Yes.

Q. You would report that?

A. All the way. I would report all other lines as well.

Q. Mr. Evers, by subpoena we have asked that you bring in reports for the year 1953 relating to tonnage of business solicited for several years back?

A. We do not make such reports.

Q. You were asked for a report submitted to Southern Railway Company during the year 1953 showing volume of freight moving out of Montgomery County Alabama, and handled in whole or in part by the Southern Railway Company?

A. We do not submit any such reports.

Q. How about freight?

A. Same thing.

Q. You are pretty familiar with the business you solicit, are you not?

A. I would think so.

Q. In your best judgment what tonnage did your office solicit and move out of Montgomery County?

A. I can't give you that, I can't give figures offhand.

Q. You do know there was a substantial number of tons?

A. That is right, yes.

Q. We asked for a copy of all advertising materials, pamphlets, brochures, timetables, distributed or put out by Southern Railway Company and Southern Railway System, through the said office or available to the public through said office?

A. We have that.

Q. I ask you about this document, Map of Southern Railway System stating it serves 14 states, dated April 1, 1953. This was brought from your office?

A. That is a Map of the Southern Railway System.

(Received in evidence and marked Plf. Ex. No. 3.)

Q. That map of the System shows the lines that car traveled on, did it?

A. Yes, sir. It shows that it traveled on NO & NE.

Q. I will show you another document entitled Merchandise Car Directory, Southern Railway System?

A. That is right.

Q. That is dated July 1, 1943-1953, that was put out by your office? On the first page there let me show you the emblem on the inside cover. Southern Railway System with the S. R. in the middle.

A. That is right.

Q. That shows a map of the system?

A. Yes.

Q. There is a full word V. P. of Southern Railway System.

A. Yes.

Q. This book on Merchandise Car Directory, what is this?

A. In brief it lists the principal stations and transfer points and is therefore a part of the Southern Railway System.

Q. That comes out of your office?

A. That is right.

Q. Next I will show you a document entitled "Coal and Coke" with the System's emblem on it, does this come out of your office here?

A. It does.

Q. This shows on the inside cover, Sales and Service over the Whole Southern Railway System.

A. That is right.

Q. Included there is the First National Bank Building and E. A. Evers, that is your office?

A. That is correct.

Q. You have a Sales and Service Office?

A. That is right.

Q. What in general terms is this?

A. That is an informal brochure listing the coal mentioned.

Q. Included here is Alabama District, Birmingham, Mobile Division. The Southern A. G. & S.

A. That is the Alabama Great Southern Railway.

Q. That was one of the companies that handled that car in question?

A. That is right.

Q. On Page 8 there is a map showing the lines of the Alabama Great Southern.

A. That is right.

Mr. Godbold: Q

We offer this in evidence as Plaintiff's Exhibit No. 5. (Received and marked Plaintiff's Exhibit No. 5.)

Q. The next document, Mr. Evers, is this little booklet showing a picture dated December 20, 1953, Southern Railway System. This is a timetable for passenger trains.

A. That is right..

Q. Do you have with you an operating timetable?

A. No.

Q. Is there such a document?

A. Yes.

Q. You do not put them out?

A. No.

Q. Just in general terms what is a timetable?

A. It indicates the arrival and departure of passenger trains.

(Plaintiff's Exhibit No. 6.)

Q. I will show you here a map in the middle it contains a map of Southern Railway System, which includes New Orleans and Northeastern.

A. That is correct.

Q. This booklet shows the arrival and departure time of trains all over the Southern and affiliated lines?

A. That is correct.

Q. We also asked Mr. Evers, for some of your stationery. Do you have that?

A. Yes.

Q. It has Southern Railway System on it? The envelopes indicate Southern Railway System and the letterheads. Do you use Company stationery?

A. No, sir, just plain white paper.

This is Plaintiff's Exhibit No. 7.

(Received and marked Plaintiff's Exhibit No. 7.)

Q. We asked you, Mr. Evers, to bring with you some of your report forms? Blank report forms?

A. I brought the forms. There are thirteen sheets of report forms.

Q. Mr. Godbold:

We offer these in evidence as plaintiff's Exhibit No. 8.

(Received and marked Plaintiff's Exhibit No. 8.)

Q. This is entitled Southern Railway System Employees' Application For Free or Reduced Rates Registration. In response to my subpoena you have supplied me with certain forms. All these come out of your office here?

A. That is right.

(Received and marked Plf's Exhibit No. 9.)

Q. This is Southern Railway System percentages of damage and loss claims. (Marked Plaintiff's Exhibit No. 10) From the accounting department. Application for refund of unused tickets values. We offer this as Plaintiff's Exhibit No. 11. (Received and marked Plf's Exhibit No. 11) Southern Railway System application for a position.

We offer all the rest rogether. We offer these as one exhibit the remainder of documents supplied by Mr. Evers and marked Exhibit No. 12. Some of which Your Honor, referred to System and one of which

referred to neither. I believe there were two that referred to the Company. One of the two being a check form and the other a requisition for stationery.

Q. Mr. Evers do you make any report to any other office concerning general conditions here in Montgomery County? Some such as other companies submit, such as weather and crop conditions?

A. Not as a regular thing.

Mr. Godbold:

I am going to rest on that, Judge. Except I would appreciate leave of the Court if you think it is necessary to put in affidavits as quickly as we can complete our information as to interlocking.

Mr. Stewart:

I don't intend to go back over all this with Mr. Evers. He has filed his affidavit.

Q. Mr. Evers you testified you are employed here in Montgomery by the Southern Railway Company?

A. That is correct.

Q. You have not testified you know all of the detail and intricacies of that constitutes that makes that Southern Railway System?

A. I am not qualified to do that.

Q. Do you know about the set up of railroads?

A. I do not know.

Q. Is your knowledge confined solely to your office here in Montgomery?

A. That is right.

Q. Your activitres you have testified to here today in behalf of the Southern Railway Company is what you have testified of here today?

A. That is correct.

Q. Also your activities these you have stated in your affidavit, dated December 1, 1953, which is on file in this cause.

A. That is right.

Q. Mr. Evers, in making these requests for reconsignment, Mr. Godbold gave you an example of a car on the New Orleans and the Northeastern, when the customer wanted another point. What would be your action in such instance, if that car had been on one point in Alabama and some customer wanted it at another point. What would you have done? Would they have been the same?

A. Yes.

Q. Your action in relation to cars outside Montgomery is the same as in regard to outside the Southern in other words, in this reconsignment of a car on other railroads, your request would be the same on any railroad?

A. Yes.

Q. The same as if it were the Pennsylvania RR or the New York or any other line: Your interest in freight is also for other lines that connect with the Southern and affiliated lines. You have to sell a through service and to that extent you would have interest in other lines as well as a service to perform. But you have not undertaken to say the Southern Railway Company and the Southern Railway System is the same or is not the same as the Southern Railway System?

A. No.

Mr. Godbold:

We object.

Mr Stewart:
Judge, he has not attempted to show distinction.

The Court:
Under the testimony I don't see whether there has been any marked distinction.

Mr. Stewart:
He is not qualified to say whether there is or there is not a distinction. He has testified if there is a distinction he does not know what it is.

That is all. No further questions.

* * * * * * * * *

I, Ethel M. Schneider, do hereby certify the foregoing testimony, pages 1 through twenty-five, inclusive constitutes a true and correct transcript of testimony in said cause, as taken by me.

This the 8th day of February, 1954.

ETHEL M. SCHNEIDER,
Court Reporter.

ORDER OVERRULING MOTION FOR SUMMARY JUDGMENT.

Filed Feby. 8, 1954.

(Title Omitted.)

The motion for a summary judgment, filed herein by the defendant Southern Railway Company, having been considered and understood by the Court, the

Court finds that the defendant is not entitled to the relief sought,

It is therefore ordered that the defendant's motion for summary judgment, be, and is, overruled and denied.

This 8th day of February, 1954.

C. B. KENNAMER,
United States District Judge.

ORDER OVERRULING MOTION TO DISMISS.

Filed Feb. 8, 1954.

(Title Omitted.)

The Court having considered and understood the motion to dismiss the plaintiff's complaint, as last amended, filed by the defendant Southern Railway Company, and the Court having heard counsel for the respective parties on the motion; and the Court finding from the testimony and affidavits that the Southern Railway Company does business by agent in Montgomery County, Alabama, within the northern division of this judicial district:

It is, therefore, ordered that the motion to dismiss the plaintiff's complaint, as last amended, filed by the defendant Southern Railway Company, be, and is, overruled and denied.

This 8th day of February, 1954.

C. B. KENNAMER,
United States District Judge.

(Title Omitted.)

Comes Southern Railway Company, a corporation, one of the defendants in the above entitled cause, and for answer to plaintiff's complaint, as amended, and to each count thereof, as amended, both separately and severally, files the following separate and several defenses, to-wit:

1. This defendant, Southern Railway Company, avers that the cause of action set forth in the complaint accrued more than one year prior to the time that this defendant, Southern Railway Company, was made a part to this action; and defendant avers that the action against this defendant, Southern Railway Company, is barred by the statute of limitation of one year.

2. Defendant admits that this defendant, Southern Railway Company, was on to-wit: May 6, 1952, engaged in the business of operating a railroad as a common carrier in transporting freight and passengers for hire in interstate commerce; but the defendant expressly denies that this defendant, Southern Railway Company, did, on to-wit: May 4, 1952, or at any other time, have in its possession or take in its possession, tank car SHPX 21336, at New Orleans, Louisiana; and defendant expressly denies that this defendant, Southern Railway Comaany, did serve as

the originating carrier of said tank car. And defendant expressly denies that this defendant, Southern Railway Company, has breached any duty owing to the plaintiff; and this defendant, Southern Railway Company, hereby expressly denies each and every other material averment contained in said complaint.

3. Defendant avers that the plaintiff, W. A. Shields, did, at the time and place complained of, so negligently conduct himself on and about said tank car as to proximately contribute to his alleged injuries; and defendant avers that said negligence of the plaintiff proximately contributed to the plaintiff's alleged injuries.

Respectfully submitted,
E. A. STEWART,
Of Counsel for defendant,
Southern Railway Co.

PETTUS, FULLER, REEVES & STEWART,
Selma, Alabama.

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Montgomery, Alabama.

Attorneys for Defendant,
Southern Railway Company.

I hereby certify that I have this day mailed, postage prepaid, copy of the foregoing to Messrs. Godbold & Hobbs, Montgomery, Alabama, Attorneys for the Plaintiff.

Dated this 10th day of February, 1954.

E. A. STEWART,
Of Counsel, for defendant,
Southern Railway Company.

Filed Feb. 12, 1954.

O. D. STREET, JR.,
Clerk.

In the District Court of the United States for the middle District of Alabama, Northern Division.

Filed May 27, 1954.

Montgomery, Alabama
February 23, 1954

W. A. Shields, Plaintiff,
vs. Civil Action No. 896-N.
Atlantic Coast Line Railroad Company, a Corporation, and Southern Railway Company, a Corporation, Defendants.

Before: Hon. C. B. Kennamer, District Judge, and a jury.

Appearances:

Mr. John Godbold, and Mr. Albert Copeland, Attorney for Plaintiff, Godbold and Hobbs, Montgomery, Alabama.

Mr. Evans Hinson, and Mr. D. N. Hamilton, Montgomery, Alabama, Attorneys for the Atlantic Coast Line RR.

Mr. Edgar A. Stewart, Pettus, Fuller, Reeves and Stewart, Selma, Alabama, Attorneys for Southern Railway Company.

Col. Marion Rushton, Rushton, Stakely & Johnston, Montgomery, Alabama, Attorneys for Southern Railway.

Stipulation.

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Montgomery, Alabama
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W. A. Shields, Plaintiff,
vs. Civil Action No. 896-N.
Atlantic Coast Line Railroad Company, a Corporation, and Southern Railway Company, a Corporation, Defendants.

It is stipulated and agreed by and between all parties to this cause that the testimony of Dr. Wm. L. Smith, Dr. W. J. Kocour, Dr. Elias Kaiser and Dr. Jackson Bostwick, be deleted from the transcript of testimony and from the record in this case.

ALBERT W. COPELAND,
Attorney for Plaintiff.
EVANS HINSON,
Attorney for Defendant A. C. L. RR.
MARION RUSHTON,
Attorney for Southern Railway Company.

February 23, 1954

(A jury was duly empanneled and sworn.)

FRANK WATKINS, being called as the first witness, being duly sworn testified as follows:

Direct Examination.

By Mr. Godbold:

Q. Give us your name, please?

A. Frank Watkins.

Q. Do you live here in Montgomery, Frank?

A. Yes, sir.

Q. How old are you?

A. I am sixty-five.

Q. What work do you do?

A. I am working with Mr. Shields.

Q. You work for Mr. Shields here the Plaintiff in this case?

A. Yes, sir.

Q. How long have you been working for him?

A. Between four and five years.

Q. You work just generally with him helping him in his tank work and unloading tank-cars?

A. Yes, sir.

Q. Frank, about a year and a half or almost two years ago do you remember the occasion when Mr. Shields fell from the tank-car down here on the Atlantic Coast Line tracks?

A. Yes, sir.

Q. Were you down there with him that day?

A. Yes, sir.

Q. What were you all doing down there, Frank?

A. Unloading a carload of gas.

Q. Was that car placed, at the time he was hurt, was it placed on the Atlantic Coast Line tracks?

A. Yes, sir.

Q. When you went down there, Frank, just tell me in your own language what did you do to get that car unloaded?

A. We have to get the hose off the bottom.

Q. Bottom of what now?

A. The bottom of the car, and then you have to go up on top and turn that wheel around so the gas can come out.

Q. Now where is that wheel located, Frank?

A. It is down in the tunnel.

Q. Is that what they call the dome?

A. Yes, sir.

Q. Can you get gasoline to running out of that tank car without a man going up on top and taking off the dome and turning that valve wheel?

A. No, sir.

Q. Now, on this particular occasion, Frank, did you hook the hose on to the connection in the ground?

A. Yes, sir.

Q. Then who got up on the car to take the dome off?

A. He got up there.

Q. He got up there, do you mean Mr. Shields?

A. Yes, sir.

Q. Gas had not started coming out of the car?

A. No, sir.

Q. After he got up there what happened after that?

A. You see we connect the hose before we go up there, then after you connect the hose he goes up on top and turns that little wheel then the gas starts to running out.

Q. Well, now when he got up there this particular day, had he turned that wheel?

A. No, sir. Not until he went up there.

Q. He got up there on the car and you were down on the ground?

A. Yes, sir.

Q. Just tell us what happened after that?

A. When he got up there and when he stepped down on the plank, the plank broke.

Q. Where were you at that time?

A. I was up on there with him.

Q. You did go up there with him?

A. Yes, sir.

Q. He went up there first and you came up later?

A. Yes, sir.

Q. And you were both up there in the area of the board—

A. Yes, sir, he called me up there.

The Court:

Q. Well, did you step on the plank, too?

A. Yes, sir.

Q. And it broke?

A. Yes, sir, I was standing on it too.

Mr. Godbold:

Q. I am going to ask you to step over here in front of the jury and let me show you a picture.

I show you a picture here of that tank car with a broken board on it.

A. Yes, sir.

Q. Do you recognize that as the picture of the tank-car?

A. Yes, sir.

Q. Point out with your finger point out the part of the car called the dome?

A. It is on top.

Q. Show them on this picture here. Does that valve wheel have to be turned?

A. Yes, sir. It goes down in the dome, there is a heavy door up on top. It is pretty heavy. He called me to help lift the door up. When you connect up your hose you have to turn that for the gas to come out.

Q. This broken board dragging down here, is that the board from which Mr. Shields, fell?

A. Yes, sir.

Q. Now go back on the stand. When Mr. Shields stepped down on the board and it broke, what happened?

A. He fell.

Q. Where did he fall?

A. He fell down beyond the hole where the gas comes out. I couldn't even look around to see how far he fell. I had to hold myself.

Q. You had to hold yourself. What were you holding on to?

A. I was holding on to the iron rod.

Q. An iron rod upon the dome?

A. Yes, sir.

Q. You did not fall?

A. No, sir.

Q. Did Mr. Shields get up after a little bit?

A. Yes, sir. I couldn't look around to see how long it took him to get up. He got up shortly after then.

Q. What did he do then?

A. He got up and brushed himself and I asked him did it hurt him. He said he didn't know.

Q. After he got up and brushed himself off, what did he do?

A. Well, he goes over here and lets the men know about the board broke.

The Court:

Q. Did he go back up on the car?

A. Yes, sir.

(Godbold):

Q. After he reported and came back, the board breaking, and came back, did you and he together then finish up the job of unloading the tank car?

A. Yes, sir.

Q. How long did you stay around Frank, after Mr. Shield fell, and you were unloading the car.

A. We stayed around there about an hour as near as I can say.

Q. That is all.

Cross Examination.

By Mr. Hinson:

Q. Frank, I believe you said you went up on the car too with Mr. Shields to help Mr. Shields?

A. Yes, sir.

Q. Now, when he got up on the board by himself, the board did not break, did it?

A. No, sir, me and him were both on it.

Q. Did he get up there first?

A. Yes, sir.

Q. Then you climbed up on it?

A. Yes, sir. He called me up there to help him.

Q. And he was standing up there and when you got up there was when it broke?

A. No, sir. When he stepped on it, it broke and throwed him.

Q. Who was up there first?

A. He went up there first. He stepped on the board and it broke.

Q. You were standing on the board?

A. Yes, sir.

Q. And then he stepped on the board and it broke?

A. Yes, sir.

Q. It broke real suddenly, just like that, didn't it?

Q. Real quick?

A. Yes, sir.

Q. You got up there and stepped on the board and when you got there you looked to see where you were stepping, didn't you?

A. Yes, sir, I looked to see where I was stepping.

Q. Did you see any holes in the board, or anything like that?

A. No, sir.

Q. The board looked all right, didn't it?

A. Yes, sir. It looked to be.

Q. It looked like it had not been painted so long, didn't it?

A. It looked all right, but I think it had a knot or something in it. That was the reason it broke.

Q. But it looked all right?

A. Yes, sir. I didn't notice the board to see how it looked.

Q. When you stepped down on it, just naturally you looked down where you stepped, didn't you?

A. Yes, sir.

Q. And you didn't see anything wrong with it?

A. I didn't notice anything. When he told me to do anything I go on and jump around and do it. I figured the board was all right.

Q. You would not have stepped on it if it had had a big crack in it, or anything like that, though, would you?

A. No, sir, could have been one in there I didn't notice.

Q. When this board broke Mr. Shields fell to the ground?

A. Yes, sir.

Q. You had hung on up there?

A. Yes, sir.

Q. And Mr. Shields got back up, did he?

A. Yes, sir, he got up.

Q. He climbed back up on the car?

A. No, sir. I don't think he did. I think he went on to the shop and let some of the men know about it, about the board being broke.

Q. And then he went back up on the car?

A. Yes, sir. We unloaded the car then.

Q. He then climbed back up on the car again, didn't he?

A. Yes, sir.

Q. And he finished unloading the car? After he fell to the ground he climbed back up there again and finished unloading the car, didn't he?

A. Yes, sir, that is right.

Q. After he did that then he got back down and you finished unloading?

A. Yes, sir.

Q. Did he work the rest of that day?

A. Yes, sir, we worked the rest of that day.

Q. Did he work the rest of the next day?

A. Yes, sir.

Q. Did he work the rest of that month?

A. Yes, sir, but he complained about his shoulder and told me his back hurt all the time.

Q. When did he start to complaining about his shoulder and neck and back hurting him?

A. After he fell he say my neck and my shoulder hurts.

Q. Wasn't it six months later that he started to complaining?

A. No, sir. He complained directly after he fell.

Q. But he got back up on this car as soon as he went over there and reported this break?

A. Yes, sir.

Q. After this car was emptied, didn't he get back up there a third time and shut the valve off?

A. Yes, sir.

Q. So he got up there three times that day, didn't he?

A. Yes, sir. After we get the gas out we go back up there and shut the top down.

The Court:

Q. What if anything, did Mr. Shields tell you to do when you got up on the car?

A. I got up there to help him.

Q. Help him do what?

A. The door is pretty heavy and he told me to get up there to help him.

Mr. Stewart:

Q. Frank, show me just exactly where Mr. Shields was standing on this. Where was Mr. Shields standing in relation to this platform, when he called you to come up there, do you remember?

A. Yes, sir. He was standing on the car, he was not on the board. I was on the board when he come around

Q. Which board.

A. The board that run around the car was the one that broke, the bottom board.

Q. Did it run all the way around the car?

A. Yes, sir.

Q. It was not the one at the top by the dome?

A. No, sir.

Q. And he stepped on that bottom board and it broke, is that right?

A. It was the bottom one when he stepped on it, it broke.

Q. The top you are talking about is by this dome, is that right?

A. Yes, sir, it was the bottom one that broke.

Q. That is on this car here?

A. Yes, sir. It looks like it.

Q. You are sure it was the bottom one that broke?

A. Yes, sir.

Q. And Mr. Shields was standing on it and you climbed up on it and it broke?

A. No, sir. I was already on it. He was on the other side and I come around to help him.

Q. Did you look at it as you stepped up on it?

A. No, sir.

Q. You just stepped right on up, you didn't pay any attention to it?

A. No, sir.

Q. You don't know whether Mr. Shields looked at it or not?

A. No, sir.

Q. What were you hanging on to?

A. A rod on the car. I held on to it.

Q. Had you gotten this dome open?

A. No, sir.

Q. After the board broke Mr. Shields fell and then he went and reported that fact he had fallen. Who did he report to?

A. I don't know because I did not go. He went to a little office to report.

Q. What did you do?

A. I waited on him.

Q. How long was he gone?

A. Not very long.

Q. Then you both climbed back and opened the dome?

A. No, sir. He went back an opened the dome.

Q. Did he go back to the platform to open it?

A. Yes, sir. It has got two sides to it. He got on the other side.

Q. Which board was that on the other side, the bottom board or top board?

A. The bottom board was on this right hand side, an the bottom broke.

Q. About how high is that board from the ground?

A. Just as high as the top of the car.

The Court:

Q. As I understand yo uthere are two boards, one here and one here.

A. No, sir. I don't remember but one. It goes all around the car. There is one on the other side and one on this side.

Mr. Stewart:

Q. The one that broke goes all the way around?

A. Yes, sir.

Q. How much do you weigh, Frank?

A. About 140.

That is all.

Mr. Godbold:

Come on back to the stand. There is no dispute that tank car No. 21336 is the one that broke, is there?

A. No, sir.

Q. And Frank, these gentlemen tell us this is a picture of the car from which Mr. Snields fell, taken right shortly after he fell.

A. Yes, sir.

Q. Now, I am not talking about any other tank car, but I am talking about this one, would you put your fnger on the board that was broken and threw Mr. Shields to the ground? Is this the board here, or the one dangling down?

A. It is this board here.

Q. All right. It was not this little board up here? Frank, do you know whether that board broke right at the bracket where it extended, or if it broke a little way from the end?

A. As near as I can tell you it was near about half way.

Q. All right. I have no further questons.

If you gentlemen have no objections I would like to excuse Frank and let him go to work (Counsel agreed and he was excused.)

WILLIAM ALTON SHIELDS, called as the next witness, being duly sworn, testified as follows:

Direct Examination.

By Mr. Godbold:

Q. Will you state your name, please, sir.

A. William Alton Shields.

Q. You are the Plaintiff in this case, aren't you?

A. Yes, sir.

Q. Do you live here in Montgomery?

A. No, sir. I live at Robinson Springs.

Q. But you lived in Mongomery when this suit was filed?

A. Yes, sir.

Q. Mr. Shields, how old are you?

A. Forty-one.

Q. Are you a family man?

A. Yes, sir.

Q. How many children do you have?

A. Three.

Q. You have a wife, of course.

A. Yes, sir.

Q. How many of your children are dependent on you for support?

A. Two.

Q. How long have you been living in Montgomery?

A. About twenty-five years.

Q. Mr. Shields, what business or trade do you carry on?

A. I am in filling station business now, and classed as a pump mechanic and do general filling station work, anything pertaining to petroleum end of it.

Q. You don't have to operate a filling station?

A. No, sir.

Q. Do you do the pipe fitting and tank and pump work, that is all?

A. Yes, sir. Maintenance work.

Q. Is that common labor or is that skilled trade?

A. It is a skilled trade, I would call it.

Q. Are there many pump mechanics around these parts?

A. Not many.

Q. How long have you been carrying on that trade?

A. About twenty years.

Q. Do you know any other trade. Have you been trained in any other trade?

A. No, sir.

Q. As a matter of fact, I asked you if you worked for the railroad on that occasion, did I not?

A. Yes, sir. I worked there about a year.

Q. Did your duties have anything to do with inspection of cars?

A. No, sir. I was a brake-man.

Q. In this time, about twenty-five years, have you been carrying on your work as a tank man and pumper?

A. Yes, sir.

Q. Have you, during that time, been unloading tank cars of gasoline?

A. Yes, sir.

Q. That is part of your regular employment?

A. Yes, sir.

Q. And in connection with that sort of work, are you familiar with how tank cars are made and you know how to operate them in regard to unloading gasoline?

A. I am familiar with how to unload them, yes.

Q. When you unload gasoline from a tank car what is the general procedure you must go through, Mr. Shields?

A. The average tank car is unloaded from the bottom, unually there is a suction line that comes out of the ground, and we have a flexile two-inch hose that screws into the line coming out of the ground and then connects to the bottom of the tank car, the outlet. Then we have to go up on top, take the dome off and open the valve to release the gasoline.

Q. How heavy is that dome. Do you usually lift it off alone, or does it ordinarily take more than one.

A. Two handle it best. One can do it by standing up on it and bending and lfting it off. Some of these domes are heavy domes where they swing over.

Q. Can you start the gasoline flowing out of that tank car without getting on top of the car, breaking the seal on it and opening the dome and turning the valve?

A. No, sir.

Q. Is that dome sealed at the refinery?

A. Yes, sir.

Q. You can't unload any of it until after the seal is broken?

Q. Are you the man who breaks the seal?

A. Yes, sir.

Q. At the time this accident happened, Mr. Shields, who were you working for, were you hired by somebody or do you work for yourself?

A. I work for myself.

Q. At the time you went down there on the day of the accident, who sent you down there?

A. The Tank-Kar Oil Company.

Q. Is that here in Montgomery?

A. Yes, sir.

Q. Are you employed on their payroll, are you employed by them or are you working for yourself?

A. I was working for myself.

Q. Who told you where to go to unload the car?

A. I knew where to go. Mr. Etheridge, an employee of the Company calls me and lets me know where the car is parked and what time to unload it.

Q. Is that what we call the Tank-Kar Oil Company siding?

A. Yes, sir.

Q. Where here in Montgomery is that Tank-Kar Oil Company siding?

A. It is on a spur track behind Bell Street now, over about the middle of the yards, over hre near the back entrance of the Cost Line office.

Q. Down there between Bell Street and the river?

A. Yes, sir.

Q. Who went down there with you?

A. Frank Watkins.

Q. Does he work with you?

A. Yes, sir.

Q. Mr. Shields, would you step down here, please, sir. I will show you here a picture marked Plaintiff's Exhibit 1, and ask you if that is a picture of the car from which you fell?

A. Yes, sir.

Q. Will you point out the running board which broke and caused you to fall to the ground?

A. It is this top board beside the dome.

(Get back on the stand.)

Q. Now, Mr. Shields, when you went down there that particular day, what day was it?

A. May 6, 1952.

Q. When you went down there that day what did you and Frank do?

A. I usually carry a two-inch flexible hose with me.

The Court:

Q. If you remember it, just tell what you did this day?

A. I carried the hose to unload the gas tank.

Q. That was this particular car?

A. Yes, sir. Well, I carry the hose and wrenches down with me on the truck usually, and then we take them off and screw the two-inch hose into the pipe

that comes out of the ground. Before we couple to the bottom of the car we go on top and take the dome off, to see if the valve is closed, a lot of times it might be left open, and we have to inspect it. We have to check it for a seal.

The Court:

Mr. Shields, you say that is what you did?

A. Yes, sir, that is what I did. I took the dome off and then came back down and took the cap off the bottom and coupled up the hose, after I have turned the valves and it was all right. Then I went back up and I asked Frank to come up that I wanted to show him how to open the valves to let this gas off should I ever send him back up any time without me having to climb up the car to do it. And just as he got up with the last hand hold around the dome I stepped on the board and out from under me it went. It broke just like paper. The next thing I knew I was over to the side. I had kicked out from under the rail, my left leg went right between this iron rail around the car and in my fall I had managed to kick free of that and I fell head first, landed on my left shoulder, where the suction pipe comes out of the ground. I don't guess I laid there, just long enough to find that I could get up, I got up and shook myself and wiped off and I went over to the Coast Line Yard Office I suppose, a little house over there back of the track.

The Court:

You did that before you went back up on that tank car?

A. Yes, sir. Immediately. I saw a fellow I knew, he worked with the Coast Line, Mr. Sam Williams. I told him what had happened and knowing him, why he said something, I said you had better call somebody and tell them that the car had a bad board on it, and somebody is liable to get hurt. Then I went back to the car and finished opening the valve and getting ready to switch the pump on, which we have in separate places.

Q. You went up on the car yourself and finished unloading it.

A. Yes, sir. I took the board, after they had taken the pictures, I pulled the board off. And one of the employees at the Coast Line picked the board up and said they might need this hand-rail that was on it, in order to put another one on it. Ordinarily we switch the pump on and in about three hours we have to go back and disconnect it, which is the same procedure that we go through in coupling them up.

The Court:

Q. Did you have this picture made there that day? Who suggested you have your picture made?

A. No, sir, the Coat Line did that. They were there immediately afterwards.

Mr. Godbold:

Q. Did you have any pictures taken or any investigation made that day?

A. No, sir, the Coast Line did that.

Q. Mr. Shields, on this picture, you state when the board broke your foot caught behind a rail that goes around the car. Where is that rail that goes behind the car?

A. The rail is right here and it goes all the way around. It is an iron rail around the car, and my foot went down behind that.

Q. Which foot?

A. My left foot was skinned above the ankle. I managed to kick it free somehow in falling. I had kicked and I landed over on this side of the fill pipe.

Q. This is the fill pipe here?

A. Yes, sir. I landed right along here. When falling it looked like I was going to hit that pipe as I tumbled, and in kicking my foot free, I managed to get over that pipe there and came down head first.

Q. Do you know exactly where Frank was standing when you stepped down on the board?

A. Frank had hold, I am not positive, but I think he was standing on this rail, and this rail is about two and one-half feet from this board, and he had his hand on this top rail or iron hand-hold around the dome, because I almost pulled him off when I fell, I hit at him to catch and he was still holding to that top rail when I looked back up. I don't believe he was on the board. I think he was on that rail.

Q. You refer Mr. Shields to stepping down on the board, where had you been standing just before you stepped on the board?

A. I was on the left side and taking these bolts loose from the dome and come around the dome. I had gone back on the rightside of the dome facing North from here. I was standing on the right side and stepped down on the board with my left foot.

Q. Before you stepped down on the board, you were standing on top of the tank itself?

A. That is right.

Q. At the time you called Frank up to help you had you lifted the dome off?

A. I had loosened the bolts, I don't remember whether we had taken the dome off or not.

Q. In this picture here, has what you call the dome been taken off?

A. It don't look like it had, some of these domes you can take completely off and slide to one side, and some are hinged. I don't remember particularly whether that was a hinge type. That type stands up in the air. I don't believe the dome was off. I believe I had loosened the bolts and asked Frank to come up, and just as he got hold of the top rail, I stepped off on this board and fell, that was the stopping point.

Q. Mr. Shields, after you fell, and went over and reported the accident and came back, did you make an inspection of that board?

A. Yes, sir.

Q. What condition did you find it in?

A. It was rotten. You could take it and mash it and crumble it up.

Q. The end that was broken?

A. Yes, sir.

Q. Now, this picture I have been showing you, Plaintiff's Exhibit 1, shows the board dangling down at one end. After this picture was taken did you do anythng to that board?

A. Yes, sir, I caught hold of the end of it before we disconnected the car and threw it off.

Q. Were you able to pull it off with one hand?

A. Yes, I threw it off the car.

Q. You pulled the other end, where it is shown attached here, off?

A. Yes, sir. That is right.

Q. With one hand and you threw the board down. The last time you saw the board in the possession of any individual, who had it?

A. A Coast Line employee. He said he wanted to save that hand rail on it, for the shop to put one back on it

Does the Coast Line have that board here, Mr. Hinson?

Mr. Honson:

A. No, sir. We do not have the board. We never heard of him being hurt until a year after it happened.

Mr. Godbold:

Q. In response to Mr. Hinson's last statement, Mr. Shields, were you sent to an Atlantic Coast Line doctor?

A. I was.

Q. Did you go that day?

A. Yes, sir.

Q. Who was the doctor?

A. Dr. B. W. Cobbs.

Q. When did you first start noticing any pain or difficulty with your back?

A. Shortly after, before I left there I told one of the employees of the Coast Line that my back felt like it was sprained or something. It hurt between the shoulders, other than my foot. There didn't seem to be any broken bones in my feet, an apparently wasn't in my back as I could still use it. He suggested that I go to Dr. Cobbs.

Q. Did you go to Dr. Cobbs office that day?

A. Yes, sir.

Q. Was that the same day?

A. The same day I fell off, yes, sir.

Q. What did Dr. Cobbs do for you?

A. He had me pull off my shirt and looked at me and examined me and said I didn't have any broken bones. To go home and take a good hot bath.

Q. Did he suggest any X-rays be taken?

A. No, sir.

Q. Did the Atlantic Coast Line man tell you to have X-rays taken?

A. No, sir.

Q. Did you have any other symptoms other than the aching of the back and your leg before you left Dr. Cobb's office that day?

A. Yes, my nose started bleeding, just as I got ready to leave the Doctor's office. I was in his hall way and I called his attention to it. It bled for two or three minutes and it quit all of a sudden. He said don't tell me it is bleeding. I said I just wanted to tell you about it, and I went on out. I got in the truck and went home.

Q. Mr. Shields, as you got up on that car that day, how did you get up there on that board. Is there a ladder there used for that?

A. Yes, there is a ladder that goes off the lower running board and goes up and fastens, this particular type fastens around the rod and there is a hand-hold that you catch hold of as you climb any other ladder?

Q. Did you climb that ladder that day like you would climb any other ladder?

A. Yes, sir.

Q. As you climbed up it did you see that running board?

A. Well, I noticed the board but I did not visually inspect it.

Q. As you climbed the ladder what did the board look like?

A. Well, it apparently looked safe enough. Looking at it from the bottom as I climbed up and catching hold of the rail. There is a hand rail on it. From there you get to the top and you hold usually as you step on the board you hold there.

Q. As you got up past the running board on your climb, did you stop and make any detailed inspection of the running board?

A. No. I stepped to the left of the dome to get up on top the car, off the running board.

Q. Did you go up there to inspect the running board, or to unload gasoline?

A. I went up to unload gasoline and to take the dome off.

Q. Based on your twenty or more years of experience in unloading tank cars, I ask you whether or not you knew the day you climbed up there that the railroad employs people whose duty it is to inspect those cars?

Mr. Stewart:

We object to that. You need not answer that question.

Mr. Godbold:

I think I am entitled to ask him whether on the basis of his experience he knows that.

Mr. Rushton:

That is not what you asked. You said, based on his experience did he know that, that day.

The Court:

I guess it should be confined to what he did that day, and what the conditions were that day. I sustain the objection.

Mr. Godbold:

Q. Did you fro myour observation of the running board, either before or after the accident, observe whether it had been recently painted?

A. It looked like it had been painted within two or three months prior to this break of the board.

Mr. Godbold:

Mr. Shields, will you come down here again, please, sir. I will show you another picture, Mr. Shields, of the side of what appears to be that tank-car with a piece of timber dangling down from it. I ask you if you can identify that as a photograph of that tank-car with the broken board hanging down.

A. Yes, sir, that looks like it. It is broken from the same end.

Q. Now, the end nearest you on the picture. I ask you whether or not that is the end on which you stepped which broke?

A. That is right.

Q. Did this end pull loose from the bracket up here or did it actually break off?

A. It broke off about a foot from the end.

We offer this as Plaintiff's Exhibit No. 2.

(Received in evidence and marked Plaintiff's Exhibit No. 2.)

(At this point the testimony of Mr. Shields was interrupted to take Dr. Kocour.) (By stipulation of counsel the five doctors' testimony is not to be transcribed.)

Mr. Godbold:

Q. Mr. Shields, will you come back to the stand. Mr. Shields you told us about going to see the Coast Line Doctor on the day of the accident, about two of three months later did you see him again?

A. I saw him in about two or three weeks I believe.

Q. What was the occasion of your going back?

A. My back was hurting and had gotten worse. It began to hurt worse and I went back to see if he wanted to take an X-ray, or if he thought medical attention was necessary.

Q. Did he do anything further for you?

A. No, sir.

Q. Did he take X-rays then?

A. No, sir. He said X-rays would not do any good.

Q. After you saw Dr. Cobbs, sometime later, did you go to see Dr. Smith. Dr. William L. Smith?

A. Yes, sir.

Q. Is Dr. Smith your family doctor?

A. Yes, sir.

Q. How many times did you see Dr. Smith?

A. I think I saw him about three times, in all.

Q. What was the occasion for seeing him, what was the reason for that?

A. My back and shoulders were hurting me.

Q. Now, Mr. Shields, step down here, take your coat off and show the jury, just turn around and put your hand on the spot where you are having difficulty with your back?

A. It is about the point of my fingers there an area of about six inches.

(For the record he is indicating a place between the shoulder blades.)

Q. Beyond the pain to your back, Mr. Shields, will you explain the other symptoms which caused you to see Dr. Smith?

A. Yes. My fingers and arms were getting numb; they were going to sleep at intervals.

Q. Just what do you mean by that? Was it in both hands and both arms?

A. Well, sometimes it would catch one hand or one arm at the time, it would hardly ever get both of them at one time. Sometimes it would be these two fingers and a thumb on maybe my right hand, and then two fingers and thumb on my left hand, at other times.

Q. Did that numbness and going to sleep affect your arms also?

A. Yes, it did. It seemed to go all the way up the arms, that control these fingers.

Q. Now, did Dr. Smith give you any treatment at that time?

A. Other than examination that was all.

Q. Now on your last trip to Dr. Smith, I ask you whether or not that was just shortly before this suit was filed?

A. It was very close, I think.

Q. On your last trip to Dr. Smith I ask you whether or not he referred you to an orthopedic specialist, and stated you should see a bone doctor?

A. Yes, he did. He said I should have some X-rays to determine what the cause was for the continued hurting and paralyzing of my fingers.

Q. After Dr. Smith had referred you to X-rays by an orthopedic man that is when you had this litigation filed?

A. Yes, sir.

A. Yes, sir. We have a metal gadget that says, "Stop, tank-car connected." And we stand that up there. We stick it in the ground there.

Q. That cuts it off from the railroad, doesn't it. They won't put any other cars from the railroad on it.

A. Yes, sir.

Q. When you put that gadget on there, that track ends and that car there is in the control of the Tank-Kar Oil Company and whoever unloads the car, isn't it?

Mr. Godbold:

Judge, we object to that. That calls for a legal conclusion, as to who has legal control over that track.

Q. Well, let me ask it this way: When you put this sign down there when you are getting ready to unload that car, from then on you know that the railroad is not going to ship any more cars on there and have anything to do with that track, don't you?

Mr. Godbold:

Judge, we object to that. That calls for his undisclosed mental conclusion. Same objection.

The Court:

Well, it is put there to warn the railroad that it is in use for the unloading for this particualr, car, is it not?

A. Yes, sir.

Q. There cannot be any other car placed there while that was going on.

A. It is a caution to them to not put other cars in there and tearing the hose loose.

Q. Now, after Dr. Smith referred you to somebody else, is that when you went to Dr. Kocour?

A. No, I went to Stickley, Moore and Raynolds, in the Bell Building for X-rays. They made the X-rays before I was sent to Dr. Kocour.

Q. Then you went to Dr. Kocour?

A. Yes, sir.

Q. Had you ever been treted by Dr. Kocour before?

A. I had been there one time.

Q. How long before had that been?

A. About ten or twelve years ago.

Q. After Dr. Kocour examined you and took X-rays of you, did he put you in the hospital?

A. Yes, sir.

Q. That was in July 1953, wasn't it?

A. Yes.

Q. How long were you there?

A. Five days.

Q. You were in St. Jude's Hospital?

A. Yes, sir.

Q. What sort of treatment did you get there?

A. They stretched my neck, laying flat on my back. They put a band around my head with weights on it to pull over the foot of the bed.

Q. You were there five days?

A. Yes, sir.

Q. How long would you say you were in that weight pulling device?

A. The best I can remember it was from 3 to 4 or 5 hours, I was in about an hour and then out so long.

Q. I will show you here 4 pictures, Mr. Shields.

Q. In other words, that track at that time is for the exclusive use of the Tank-Kar Oil Cmpany in unloading that car, is it not? When you put that sign there?

A. Yes, sir. As far as I know it is. It can be moved.

Q. When you climbed up and stepped on that board, did you look down at it?

A. No, sir. I pbobably did glance at it in going up! The higher you get after you are so high your head is above the board—

Q. I believe you told the jury that the board looked like it had been painted about two or three months before?

A. Yes, we think it had been painted. We particularly noticed it after the board broke.

Q. Now, if I understood you correctly, you said that Frank Watkins was not standing on the board, when the board broke when you stepped on it? As I recall Frank Watkins testified that he was already on the board and then you stepped on the board and it broke. I believe if I understood you correctly you said he was standing on this long bar here.

A. I said I thought he was. He had his hands on the top bar that goes around the dome, and I don't see how he could possibly have been standing on the rail. Because he was still holding on to that bar when I looked back up.

Q. So he must have been standing on the board?

A. No, on the rail that goes around underneath it. I don't say that he was, because I don't remember.

Q. You don't now whether he was on the board at the same time you were?

A. No, sir. I had called him up, I was back on this side, standing on the car. Just as he caught hold of this I stepped off on the board and it broke, and I fell. I believe his feet were on this, now I am not

Mr. Stewart:

If the Court please, we object to these pictures being introduced in evidence. They serve no purpose as far as I can see, except to improperly influence the jury.

The Court:

First tell me what they are Mr. Godbold.

A. They are pictures of Mr. Shields while he was in traction in the hospital for having his neck stretched for about five days. They show the treatment he undergoes and after the inroduction of the pictures I want to ask him about whether the treatment was uncomfortable or not.

The Court:

I think the Doctor who prescribed the treatment for it would be more competent to testify.

Mr. Godbold:

Yes, sir, we will have him here and he will testify about it. But certainly we are entitled to show this man's pain and discomfort while in the hospital. And it is awfully hard to try to describe verbally to the jury what a traction device is. We would like for the jury to see just how he was treated. That is part of his treatment, Your Honor, just like there might be a cast on his leg, we could show that.

Mr. Stewart:

It would be tantamount to reenacting the scene of accident, Your Honor.

Mr. Godbold:

That is the way he was treated in the hospital, that is not a reenactment. That is a stretching he was going through.

Mr. Stewart:

It was long after this suit was filed Your Honor.

The Court:

Of course it is admissible to show that he was in the hospital and was treated but all the new mechancial instruments they used in treating him I am not sure about that.

Mr. Godbold:

Suppose a man had a cast put on his leg, the jury would be entitled to see that cast to see how uncomfortable and hot it was. But he wasn't put in a cast. He had a weight put on him, on his head and had a weight to it. He is entitled to damages for his pain and suffering and discomfort.

The Court:

Overrule the objection let it go in. You may have your exceptions.

Mr. Godbold:

Q. Mr. Shields, these four photographs, are these pictures taken while you were in traction in the hospital in July, 1953?

A. Yes, sir.

Q. These are not pictures taken later, are they?

A. No.

Q. Were they taken in St. Jude's Hospital here in Montgomery?

A. Yes.

We offer these as Plaintiff's Exhibit No. 4.

(Received in evidence and marked Plaintiff's Exhibit No. 4.)

The Court:

Q. Were the pictures made after or before the suit was filed?

A. They were made after the suit was filed.

The Court:

I sustain the objection.

Mr. Godbold:

All right, sir. We except.

Q. Mr. Shields, when you were put out there in St. Judes Hospital just tell the jury then, what sort of treatment you were given by Dr. Kaiser?

A. You would have to reverse yourself in bed and lay flat of your back with your head nearer the foot of the bed and around your chin and head they would put a halter with straps on it and on the top of it there was a catch a cord hung in and the cord went over the foot of the bed to a roller through which they applied weights and this was a continuous pull, direct on your head as you were laying down flat and could not move or turn for the time you were in there. It was very uncomfortable. There was no serious pains but the longer you stayed in there, the more uncomfortable it got.

Q. You were in that four or five hours a day an hour at the time?

A. Yes, sir.

Q. That was treatment given you there in the hospital under the supervision of a nurse and a doctor?

A. That is right.

Q. All right, sir. Judge, with that testimony we would like to offer the pictures again.

Mr. Rushton:

We object to that testimony. If is not shown that it was a result of the accident in any way. We have been waiting patiently to see something of that sort, that might be connected up later by some doctor but it is not now a part of the evidence.

The Court:

I don't exclude the description of the treatment he had but of the photographs I sustain the objection.

Mr. Godbold:

We except again.

Q. Mr. Shields I ask you if you first came under Dr. Kaiser's treatment while you were there in the hospital?

A. Yes, he visited me.

Q. Were you referred to Dr. Kaiser by Dr. Kocour?

A. That is right.

Q. Did I refer you to Dr. Kaiser?

A. No, sir.

Q. Or Dr. Kocour?

A. No, sir.

Q. Have you been under Dr. Kaiser's treatment since then?

A. Yes, sir.

Q. How many times, in your best judgment, have you been treated by Dr. Kaiser?

A. About eight times.

Q. What do those treatments consist of, Mr. Shields?

A. Various ways of stretching my neck and beating me with a hammer and, just a rubber hammer, on different parts of my body, my elbows and arms and around the back and then usually he lays me down on a table and with help, with somebody to hold my feet he pulls my neck back and forth, and tries to manipulate it, I think he calls it. Get it back in shape and stretch the muscles.

Q. After you had the treatment in the hospital, in July 1953, did that give you some temporary relief?

A. Yes, temporary, it did relieve it a little.

Q. In January of 1954, just last month, were you put back in the hospital again?

A. Yes, sir.

Q. Who sent you there?

A. Dr. Kaiser.

Q. What did he do to you that time?

A. He put me to sleep.

Q. Do you know what he did with you while you were asleep?

A. No, I don't. He said he was going to manipulate my back.

Q. These treatments which Dr. Kaiser has given you, including the manipulation under anesthesia last month, have those treatments given you any relief?

A. Just temporary relief. The last time maybe a day or two it gave me some relief, laying down and being quite I suppose helped.

Q. Dr. Kocour mentioned the question of blood pressure. Did you ever know anything about having any high blood pressure before you fell off this tank-car?

A. No, sir.

Q. Now, as a matter of fact, were you not examined by the city for a fire department job some years ago?

A. Yes, sir.

Q. And at that time was something said about your blood pressure?

A. Yes, sir, but it was not enough to make me not work on the fire department.

Q. You were put to work with the fire Department?

A. Yes, sir.

Q. Have you ever been treated for high blood pressure?

A. No, sir.

Q. Mr. Shields, in your work, what sort of tools and equipment do you have and handle?

A. I handle some small mechanical tools and from that on to a 36 to 48 inch Stillson Wrench.

Q. What is a 36 to 48 inch Stillson Wrench weigh?

A. I imagine they weigh about fifteen or twenty pounds.

Q. Now, in your job of handling Stillson wrenches, pipes and tanks, how do you have to use your hands and arms in using those wrenches?

A. There are different positions you get in, sometimes it depends on whether you are working down in a hole—most of my pipe work is underground, I am usually in a foot wide ditch. You have to put one Stillson wrench on the pipe and then take another one and tighten it or loosen it. And sometimes it is in a different position, from laying down position to most any position you can get in.

Q. Now in the process of using those Stillson wrenches, and moving your arms, do you have any difficulty in performing those operations?

A. Yes, sir. Any pull it seems like it wants to pull my back in two. It seems like one arm might leave the other one. it hurts bad enough that you quit pulling.

Q. Now, in your work, prior to the time of accident, did you have to do any heavy lifting?

A. Yes.

Q. Since the accident have you been able to carry on your work since your back has started troubling you, have you been able to carry on your work in the usual way or have you had to hire additional help?

A. I have had to hire help. Particularly if doing any hard work.

Q. Mr. Shields, you have continued to do your work, as best you could, have you not?

A. Yes.

Q. When you have not been in the hospital or the doctor's office you have been on the job, haven't you?

A. Yes, sir.

Q. Prior to the time of the accident, how long a day did you work?

A. Any where from eight to ten, twelve or fifteen hours a day.

Q. Now since the accident have you been able to work such hours as that?

A. No. I try to stay on the job eight hours a day with good care. If I pick up anything in the moring, usually that finishes the day, I do manage to stand around and show my helpers what to do.

Q. In the process of doing your work, Mr. Shields, do you have to do much traveling?

A. Quite a bit, yes, sir.

Q. How do you travel?

A. In a pick-up truck.

Q. That is your truck. Are you able to drive your truck as you once did?

A. No, sometimes I drive with one hand quite a bit.

Q. Now, this numbness or difficulty in your hands, and arms, how often do you have that. Do you have it all day long?

A. Usually, yes, sir. The numbness I can stand, it does not stay in all the time itself. It has gradually grown worse, over the last six months, it has gotten to where it comes in several times during the day. Of course the pain stays there all the time.

Q. The pain where?

A. Between my shoulders and up the leaders in the back of my neck.

Q. Are you able to move your neck freely, without pain, Mr. Shields?

A. No, sir.

Q. In your work do you have to get down under ground and hook up equipment and you have to work looking up?

A. Yes, sir.

Q. You were talking about working under ground, how do you usually work underground, Mr. Shields?

A. In a bending position usually over and between your legs. That is about the only way you can get down to it, the pipes go every way.

Q. When you have this numbness or paraplegia I believe they call it, in your hands and arms, are you able to do the work with the wrenches and fittings and so on as you did before this accident?

A. No, you have to wait on that to clear up.

Q. Mr. Shields, before this accident, had you ever had any difficulty with your back or between the shoulder blades?

A. Not a bit.

Q. Had you ever been hospitalized before?

A. No, sir.

Q. Well, how old are you?

A. I am forty-one.

Q. And you have never been in the hospital before?

A. No, sir, except for a burn one time on my hands

Q. Had you ever had any difficulty with your hands and arms before the accident?

A. No, sir.

Q. I believe you told me that some years ago you did have some trouble with your tonsils?

A. Yes, sir.

Q. How long ago was that?

A. About fourteen or fifteen years.

Q. Did you have your tonsils out?

A. No, sir.

Q. How long did that last?

A. A week.

Q. Going back, Mr. Shields to the date of the accident, how long was it after you fell from that tank car before your back started troubling you?

A. It started off and it never did get well.

Q. Was your back troubling you that day before you went to Dr. Cobbs office?

A. No.

Q. Mr. Shields, when you go home at night, you told us about how your back and arms are affected, when you go home at night, how is your life affected by this condition?

A. Well after I spend a day, I am pretty miserable. I can't rest very well. I usually go to bed pretty early and get in a relaxed position, I lay flat on my back. I can't lay on either side. It seems to twist my arms if I try to raise my arms, it twists and begins

to hurt. I turn over and try to lay that way a while and I usually lie flat on the bed looking up. That is about the only position in which I can get comfortable to go to sleep.

Q. Did you ever have to take any medicine of any kind to make you sleep?

A. Yes, I take aspirin.

Q. You don't have to take any kind of dope or sedatives?

A. No, sir.

Q. Mr. Shields do you have any other way to earn a living other than working with your hands?

A. No, sir.

Q. Have you got any other way to support your family?

A. No, sir.

Q. If this condition either continues or grows worse, have you got any other way to make a living?

A. No, sir.

Q. Just what is your feeling about that condition?

Mr. Stewart:

We object to what his feeling about it is.

The Court:

Yes, I believe I sustain the objection to that.

Mr. Godbold:

Judge, we are entitled to show as an element of damages, this man's worry and mental disturbance over this injury, and the most competent evidence of that is his statement of how he feels about it.

The Court:

Do you mean what compensation he should have?

Mr. Godbold:

An element of his damages, Your Honor, is mental suffering as well as physical pain, and we are entitled to show that by his testimony about it, as to whether he can accept this philosophically, or whether it disturbs him or worries him.

The Court:

Sustain the objection to that.

Mr. Godbold:

All right, sir. We except.

Q. Mr. Hinson, we have here the other pictures taken by the Coast Line at the scene that day.

Mr. Hinson:

Those pictures I gave you?

Mr. Godbold:

Yes, we offer these in evidence.

(Received in evidence and marked "Plaintiff's Exhibit No. 5.)

Q. Mr. Shields, have you made any record of your hospital expenses and medical expenses?

A. I kept up with that the bst I could.

Q. Have you got that statement with you, give us those figures?

A. Shall I read it?

Q. It includes bills to whom?

A. Dr. Smith, Dr. Stickley, Reynolds & Moore, Dr. Kocour, Dr. Kaiser, and St. Jude's Hospital.

Q. Do you have a total on those?

A. Yes, sir. $342.65.

Q. Have those bills either been paid by you or are you obligated to pay them?

A. Yes, sir. It has on the back the approximate time lost.

We offer that in evidence.

(Received in evidence and marked "Plaintiff's Exhibit No. 6.)

Q. About how much time have you lost in the hospital, Mr. Shields?

A. Seven days I believe. I was in the hospital two different times.

Q. About how many days have you spent in the doctors' offices being examined or treated?

A. I figured about eight days.

Q. You total that up here as about 120 hours.

A. Yes, sir.

Q. This is your figure here?

A. Yes, sir.

The Court:

Is that included in that total you give or not?

A. No, sir. This is a separate account.

Q. You put here $2.00 an hour. Is that in your best judgment about what your average wages would be?

A. Yes, that is about what it would have been.

I have no further questions at this time.

Cross Examination.

By Mr. Hinson:

Q. Mr. Shields, who called you to come and unload this Tank-Kar?

A. Mr. Etheridge.

Q. Who is he with?

A. He is with the Tank-Kar Oil Company.

Q. Had the car been delivered to the Tank-Kar Oil Company, and they called you to unload it?

A. That is right. Mr. Etheridge did. I understand that when the car is placed they call him and he in turn calls me to connect and pump it out.

Q. I believe there is right adjacent, right by the side of where this car was placed, there is a tank

A. No, sir. The pipe comes out of the ground.

Q. The pipe comes out of the ground?

A. Yes, sir, a two-inch pipe runs up to the edge of the hill.

Q. Where does it go up there?

A. It goes from the hill up to the filling station.

Q. The Tank-Kar Oil Company?

A. Yes, sir. They have a filling staton.

Q. In other words, this Tank-Kar Oil Company is on the hill there?

A. That is right.

Q. And they have a pipe running from the edge of this siding?

A. Yes, sir.

Q. And the car had been delivered to the Tank-Kar Oil Company on that siding, had it not?

A. Yes, sir.

Q. Now when they called you to unload it, and before you unloaded it, did you put a flag up there? At the end of that track there?

positive but as I remember looking up he was holding on to this bar, because I caught at him when I fell. I liked to have pulled him off and if he hadn't been holding on to that I could have pulled him off.

Q. He could have been standing on this board and still holding on to that bar?

A. It is possible, yes. He was in a leaning position in order to stand on it. Ordinarily when you stand on the board then you can straighten up.

Q. Now did the board break off sudden?

A. Yes, sir.

Q. It just broke sudden and you fell and hit the ground?

A. Yes, sir.

Q. And after you hit the ground you got back up and got back up on the car, did you not?

A. No, sir. Not right then. I went across to the Coast Line.

Q. You went across to the Coast Line office and notified them that the board had broke, and then you came back and climbed back upon the car?

A. Yes, sir.

Q. And you continued with the work you had?

A. Yes, sir.

Q. Did you climb back upon the car later on?

A. After it was unloaded, yes, sir.

Q. You climbed back up there to put the dome back, didn't you?

A. Yes, sir, to close the valve and replace the dome.

Q. I believe you said you went over there and asked one of the Coast Line men, and they suggested you go to a doctor, and suggested Dr. Cobbs?

A. Yes, sir. After Mr. Williams—the only man I know who worked in the yard, he is a switchman.

I told him what had happened and I asked him to report this board being broken and that I had fallen off, it was probably five or ten minutes after that period that several from the Coast Line office were out there.

Q. They came out and made some pictures of you, didn't they?

A. Yes, that was a few minutes later. The pictures were taken before I finished tearing that board off. I had to open the valve, go over on the edge of the hill, open the valve and switch the electric motor on, which pumps the gas, then one of the men, I believe he works in the office there, had me wait at the end of the platform until he called Dr. Cobbs and made that appointment.

Q. You went on to Dr. Cobbs office?

A. Yes, I went straight out there.

Q. I believe you said your nose was bleeding, is that right?

A. I said my nose started bleeding just as I started out of his office and it bled some time.

Q. Have you had any trouble with your nose bleeding since then?

A. No, sir. Nor before either.

Q. You have not been bothered with it since then?

A. No, sir.

Q. You had been examined by the City for the Fire Department, I believe you said?

A. Yes, sir.

Q. What about that, wasn't there some question about your blood pressure then?

A. The best I can remember it was up about five points.

Q. Mr. Shields, had a doctor ever told you before that high blood pressure caused nose bleed?

A. No, sir.

Q. Had your nose ever bled before?

A. No, sir.

That is all.

Cross Examination.

By Mr. Hinson:

Q. Mr. Shields, getting back to the day of the accident, did I understand that you had climbed up on the platform and had started to close the dome and then climbed back down?

A. I don't believe I had climbed all the way back down. I had climbed up and went to the left of the dome—

Q. You had climbed up on the tank, itself?

A. That is right. I was standing up on the tank and I believe we had a bunch of bolts that goes around and holds the dome. Bolts with nuts on them. You take all those loose, loosen them up and then lay down and the dome lifts off. Of course, taking those bolts loose I was on the back side, on the opposite side, I was standing on the top of the car when I asked Frank to come up and help me lift the dome and to show him the valve.

Q. You climbed up on this ladder and climed up on this platform?

A. Yes, sir.

Q. The platform did not break when you climbed up on it that time, did it?

A. No, sir. I was on the left end.

Q. Did you look at the platform at all that time, as you climbed up on it?

A. No, not other than just looking at it going up.

Q. In other words, you were right under it, and then you came on to the top.

A. That is right. After you catch hold of the rail you catch hold of the dome hand-hold and naturally you step from it to the board, and then to the top of the car.

Q. And it looked all right to you then, didn't it?

A. Yes, apparently, I did not inspect it.

Q. And nothing happened at that time?

A. No, sir.

Q. And then you climbed up on the car and loosened the dome and then you stepped back on the platform?

A. Yes, sir.

Q. Did you look at it that time as you stepped back down?

A. No, I didn't see it, I fell then.

Q. Well, it didn't break when you stepped on it that time, did it?

A. That is the time it broke. When I came back around and stepped on the opposite end is when it broke.

Q. In other words, you called Watkins up before you stepped on it?

A. That is right.

Q. And then Watkins climbed up, he had been back on the ground while you were on top of the tank?

A. That is right.

Q. And then he climbed up and you say you are not sure whether he was or was not on the platform when you stepped back on it?

A. I don't know where his feet were, but I know where his hands were because he was still holding on to it when I fell.

Q. He was holding on to the dome itself? But you didn't pay any attention to whether his feet were on this platform or whether he was standing on this rail, but he could have been on the platform, you just didn't know?

A. No.

Q. And it was at that time that the platform broke and you fell, is that right?

A. Yes, sir.

Q. You did go to Dr. Cobbs that day. That was May 6, 1952, is that right?

A. Yes, sir.

Q. And Dr. Cobbs treated you for sprain and bruises, did he not?

A. He looked at me.

Q. Did he suggest any X-Rays?

A. No, sir.

Q. What complaint did you make to Dr. Cobb? Where did you tell him you were hurting at that time, Mr. Shields?

A. I told him I was hurting between my shoulders. When I moved my shoulders it felt like there was a bone or muscle or something in there that was dislocated or sprained, or something. However, my ankle, my left leg up above the ankle was skinned, right on the bone, and that hurt as bad as anythng as far as feeling pain.

Q. You were sore on your back and also on your leg. That was on May 6, and I believe you said you went back to Dr. Cobbs one time?

A. Yes, sir.

Q. And that was two or three weeks after that time?

A. Yes, sir.

Q. Did you hurt continuously from the time you were there until the time you went back to Dr. Cobbs, two or three weeks later?

A. It stayed sore, yes, sir. Any movement I made it hurt me.

Q. Did you tell Dr. Cobbs of all those symptoms when you went back to him the second time?

A. Yes, sir.

Q. What treatment, if any, did he prescribe at that time?

A. Dr. Cobbs, said I just want to tell you. He said there is just not anything that I can do for your back because I don't know what is wrong, I can't see what is wrong in there and the only thing I know for you to do is to take hot baths and massage your back.

Q. And Dr. Cobbs diagnosed and recommended that you take hot baths and massage the place?

A. Yes.

Q. Did you follow that treatment?

A. Yes, sir.

Q. Did it relieve you at all?

A. No, only temporary.

Q. Did you go back to Dr. Cobbs again a couple of weeks after the accident?

A. I made two trips.

Q. You only made two trips to Dr. Cobbs?

A. Yes, sir.

Q. You did not go back to him?

A. No, when he said he could not do anything else for me, I didn't see it was any use to come back and he didn't invite me back.

Q. And that was about two or three weeks after May of 1952, so that you would have seen Dr. Cobbs,

the second visit, would have been sometime in June or the early part of July, of 1952?

A. I believe the day I went a gentleman from the Coast Line came up to Bell Street, which is the Tank-Kar filling station, and he said he had to make a report on the accident and my progress after the accident. And in that statement I signed, and they should have, that I was going to Dr. Cobbs that day, and if I am not mistaken I called for an appointment at the time he was there.

Q. But you said you only went to him twice and the second time was some two to three weeks, I am not trying to pin you down.

A. Yes, sir.

Q. The next time you went to a Doctor, was when you first went to Dr. Smith, is that correct?

A. Yes, sir.

Q. Was that first visit on or about the second week in September of 1952?

A. Several months later.

Q. Several months later and you didn't go to any doctor between that time of your visit to Dr. Cobbs and this visit to Dr. Smith?

A. That is right.

Q. That is William L. Smith, Dr. William L. Smith, you say he was your family physician.

A. Yes, sir.

Q. You say he is your family physician?

A. Yes, sir.

Q. You saw him then at this time in September, several months afterwards, what had been your physical condition between the time that you last saw Dr. Cobbs and the time you saw Dr. Smith?

A. My condition gradually grew worse as time went along. I tried to avoid work by hiring somebody

to do it and take these massages and hot baths, and to see if cutting down exercises and the labor would help me.

Q. You continued to work though during that period?

A. I stayed up, yes.

Q. You stayed up and you didn't see any other doctor for treatment during that time?

A. That is right.

Q. What treatment did Dr. Smith prescribe for you, if any, on the first visit in September, 1952?

A. He did not prescribe anything other than massaging as best I can remember. I don't remember whether that was the time or the second or third time he suggested that I go to have an X-Ray made.

Q. The first time, which was September, 1952, he told you to have an X-Ray made; and the first time in September 1952, he recommended massages, did he not?

A. Yes, sir.

Q. Which was the same treatment that Dr. Cobbs recommended, is that correct?

A. Yes.

Q. And is it not a fact that you didn't go back to Dr. Smith until March of 1953, some six months after the first visit to him?

A. I don't remember exactly what the exact date was.

Q. For your information, Mr. Shields, in your Interrogatories you said there was a lapse of four or five or six months between the first visit and the second visit to Dr. Smith, is that right?

A. Yes.

Q. On this second visit that he recommended that you go to Dr. Kocour?

A. No, I believe he recommended that I have X-Rays made.

Q. Was that on this second visit of March in 1952?

A. It could have been. I am not positive on that.

Q. You went to him in March and then you didn't go back again until May 5, 1953. Is that right? About two months, that was your third visit.

A. At his office I think that is about right.

Q. As a matter of fact, wasn't it on this last visit in May, 1953, that he recommended that you have the X-Rays taken?

A. On the first examination he told me he could not tell what was wrong with my back by looking at it. No more than he could tell what was inside a baseball by looking at the cover. That over a period of time some rubbing or treatment of any kind you could get for relief, it might clear up and again it might not.

Q. But you didn't have any X-Rays made until May of 1953?

A. No.

Q. That was when you went to Dr. Kocour and he had X-Rays made?

A. No, I had some made by Stickley, Reynolds and Moore.

Q. When was that?

A. Dr. Smith called him and made an appointment with him, I believe in May last year.

Q. Were those X-Rays taken by Drs. Stickley, Moore and Reynolds they were taken just a few days after this suit was filed, is that correct?

A. Maybe it was after.

Q. Those were taken at the suggestion of Dr. Smith, then?

A. Yes.

Q. Was it the last visit to Dr. Smith that this suggestion was made?

A. He might have mentioned X-Rays at all visits. I am not sure it was brought up. Sometimes an X-Ray on a bone injury don't show up for quite some time. Over a period of time they show up more than they do at first. That is the reason we didn't have the X-Rays made earlier.

Q. Did Dr. Smith then refer you to Dr. Kocour?

A. Yes, not necessarily Dr. Kocour, he told me to go to some who specialized in orthopedics surgery. I had been to Dr. Kocour and I thought I would go to him.

Q. You testified that you had been to see Dr. Kocour some ten or twelve years ago, what was the nature of your trouble then?

A. I had a touch of sinusitis.

Q. How long did he treat you for that?

A. Three trips I think.

Q. At the time that you took this examination for the City in 1944 or 1945, you did find that your blood pressure was high, did you not?

A. He just said it was kind of high, or a little bit high.

Q. It was not so high that you did not qualify?

A. That is right. I worked in the Fire Department.

Q. Had you had any high blood pressure before that time?

A. No, not that I know of.

Q. Did you have your blood pressure taken in between 1944 and the time it was taken after this accident?

A. I don't remember, every time a doctor looks at you he takes your blood pressure, so I just take it for granted.

Q. What visits did you make to doctors between 1944 and the time of this accident in 1952?

A. I don't recall. Maybe a cold or sometihng like that.

Q. Who did you go to see on these occasions?

A. Dr. Smith, the family doctor.

Q. Do you recall specifically whether he took your blood pressure on any of those visits? Prior to 1952?

A. No, I don't recall.

Q. Would it be possible that he did, and you might have forgotten it?

A. It could be.

Q. Mr. Shields, this pain, that I understand is mostly in your shoulder-blades.

A. It is in between the two shoulder blades. It feels like it is about five or six inches down. It is in a six-inch radius it feels like back there. After it hurts awhile you think it is hurting all over.

Q. You had this pain almost immediately after this accident, you say?

A. It did hurt. My back has gradually grown worse.

Q. It has continued then, on through May of 1952, is that correct?

A. That is right.

Q. This tingling in your fingers, when did that start, Mr. Shields?

A. The best I can remember, at first it did not come and go as rapidly as it did in later days. I don't remember, but probably from three to four or five or six months afterwards.

Q. You mentioned having burns of your hands some years ago. How did that happen, Mr. Shields?

A. Gasoline caught fire.

Q. Did you get a severe burn?

A. Just a third degree burn.

Q. Did you have any infection from it?

A. No, sir.

Q. Did you ever have any tingling in the fingers after the fire?

A. No, sir.

Q. You went to Dr. Kocour in June or July of 1953. You didn't go to him until after this suit was filed?

A. No, sir.

Q. And he did take some X-Rays?

A. Yes, sir.

Q. And he then referred you to Dr. Kaiser, is that correct?

A. Yes, after he put me in the hospital.

Q. Dr. Kocour put you in the hospital for observation by Dr. Kaiser, is that correct?

A. At the time—

Q. Let me put it this way. Dr. Kaiser was called in by Dr. Kocour?

A. Yes. It was while I was in St. Jude's Hospital.

Q. That was in St. Jude's Hospital?

A. That is right.

Q. That was this past July you were there?

A. Yes, for traction.

Q. It has been in the last several months?

A. Yes.

Q. And I believe you testified at that time you were there for five days on that occasion?

A. Yes, sir.

Q. And you have been under Dr. Kaiser's treatment since that time?

A. That is right.

I have no further questions.

The Court:

There are a large number of witnesses in this case, and I am anxious to get along with it, and maybe I will save some time by stating that I am going to decide this question by what the Interstate Commerce Act, itself says and the regulations promulgated by the Interstate Commerce Commission under the Act, and the pertinent decisions of any Courts on the question. Not by the oral testimony of what people say they consider it under the Act.

Mr. Hinson:

We move to exclude his testimony.

The Court:

Overrule the motion. You may have your exceptions.

Mr. Godbold:

We would like to excuse Mr. Kelley.

We offer in evidence next the repair bill of the Atlantic Coast Line Company for the repairs made to this particular tank car after it was damaged. This was furnished us by the Atlantic Coast Line Railroad Company.

(Received in evidence and marked Plaintiff's Exhibit No. 7.)

Mr. Hinson:

Your Honor, I believe Mr. Godbold is offering that to show what they call it, so we offer the same objection.

Q. And you were back in the hospital recently, when was that?

A. In January.

Q. For how long on that occasion?

A. Two days.

Q. That was for further treatment by Dr. Kaiser?

A. Yes, sir.

Q. Mr. Shields, I would like to get your medical expenses, or I would like to get this break down on it. You have had no bill from Dr. Cobbs?

A. That is right.

Q. He is the doctor for the Atlantic Coast Line and as far as you know they paid his bill?

A. Yes.

Q. You had bills from Dr. Smith for $10.00 and that is for this injury?

A. Yes, sir.

Q. And $20.00 to Dr. Stickley for X-Rays and they were taken at the request of Dr. Smith?

A. Yes, sir. It should be $25.00.

Q. And Dr. Kocour's bill was $80 .?

A. Yes, sir.

Q. And Dr. Kaiser's bill was $115.00 up to the present time and St. Jude's in July you had $78.65 there for your hospital bill?

A. Yes, sir.

Q. And in January $35.00 at St. Jude's?

A. That is right.

Q. And $363.65 is the total expenses to date?

A. Yes, I believe as near as we could get it.

Q. As I understand it, on the back of your estimate of lost time, your time lost was 7 days in the hospital—5 days in July and 2 days in January, that entire 7 days was for treatment, was it not?

A. Yes.

Mr. Godbold:

This is a repair order made by this Defendant. It was made up in its shops when repair of this car was ordered and throughout it refers to this item as a defective running board.

Mr. Hinson:

It says Dome Running Board.

(Discussion.)

The Court:

I will let you put it in, subject to their objections, and they can have an exception to the ruling of the Court. I will let you offer it in evidence.

Mr. Godbold:

Judge, we offer in evidence next the bill of lading covering this particular car from Louisiana to here in Montgomery, Alabama. It ways: bill of lading issued by the New Orleans and Northeastern Railroad. And it shows the route of the car to be Southern to Selma, Western of Alabama to Montgomery, and Atlantic Coast Line to Bell Street Siding.

Col. Rushton:

We object to that exhibit as being in any way binding on the Southern Railroad. Our ground is simply this: nothing that the New Orleans and Northeastern do by agents signing a piece of paper would bind the Southern Railroad in any fashion.

The Southern Railroad is the only one brought in here. If the New Orleans and Northeastern were brought in, it would be a different story, but there

Q. And then you estimate that you spent in the Doctor's offices getting treatments and X-Rays, in addition to this time in the hospital, approximately 6 days?

A. Yes, sir.

Q. That is a total of 120 hours, is that correct?

A. Yes, sir.

Q. Is that just from May 1952 up to date?

A. Yes, sir.

Q. And you estimate that your income would be $2.00 an hour and that you lost $2.00 an hour while you were being treated by the doctors and having X-Rays taken?

A. Yes, sir.

Q. Mr. Shields, do you recall what your income from your work was for a year prior to May 1952?

A. Somewhere in the neighborhood of $3,000.

Q. What was your income Mr. Shields, do you recall, from May 1952 to May 1953, wasn't it also approximately $3,000?

A. I don't recall, it should have been approximately.

Q. Approximately the same thing it was the preceding year?

A. Yes.

Q. What has your income been, has it been approximately the same rate of $250.00 a month since May 1952 exclusive of the time you were in the hospital, and being treated by the doctors?

A. I had not got up that.

Q. In other words your income would run about the same from time to time?

A. It has been lower this past year, than it was in the previous year, I know that.

Q. Lower, you say?

is nothing in this that is binding on the Southern Railroad.

Mr. Godbold:

Judge, that goes back to Your Honor's ruling that we previously discussed as to the relations between the Southern and all these affiliated lines of Southern.

The Court:

Well, that was the ruling on the pleadings, but I guess you still would have to offer your evidence that there was a connection.

Mr. Godbold:

Judge, that takes me back to the document I wanted to offer from Mr. Kelley. That was the purpose of offering that, to show that relation, and Your Honor suggested at that time that I wait and offer it in rebuttal.

The Court:

Well, this documentary evidence you offered was that they treated them as one and the same, I did not exclude that. I will overrule the objection and permit you to offer documentary evidence.

Mr. Godbold:

Mr. Kelley has identified this.

(Discussion.)

The Court:

The effect of the Court's ruling on the argument we had the other day, was that the Southern Rail-

A. Yes, sir. I don't now how much lower. I haven't got the total on that.

Q. Is that the result of the 120 hours you spent in the Doctor's office?

A. Well, it may be as a result of having to hire extra men. Any time I have to hire extra men, it comes out of my pocket.

Q. How many times did you have to hire extra men since May, 1952?

A. I have to keep one man on most jobs and if I have any installation to do I have to hire two.

Q. Isn't it a fact that you had to hire extra men from time to time before this accident?

A. If I install a pump, I would hire one man, but now I hire two, to avoid lifting myself.

Q. But you do do some lifting yourself, don't you?

A. I try to avoid it, when I lift is when I have worse trouble with my back.

Q. This Frank Watkins works for you, he has worked for you right on, hasn't he?

A. Yes, sir.

Q. And you do in addition to Frank Watkins have extra help sometimes?

A. Yes, sir.

Q. But you also had help from time to time before this accident, didn't you?

A. We do in heavier work. These pumps weigh 550 pounds each and it takes about four men to handle them.

Q. You had extra help before for heavy stuff, didn't you?

A. Sometimes you have a little job that you don't think you are going to have to have extra help and you have to lift to pick it up.

road Company, a Corporation, and the Southern Railroad System, were one and the same thing.

Mr. Godbold:

We offer in evidence next a document entitled "Instructions for movement of empty cars," covering this particular car, and showing the route to be from Bay Petrol Company to Port Chalmette, Louisiana, by the Southern to Selma, Western of Alabama to Montgomery. On the same issue, Your Honor, we offer in evidence the Rule Book of Southern Railway System.

The Court:

Were all these documents offered in evidence, all those exhibits, in a hearing when we had a Court reporter present?

A. Yes, sir. And we are willing to put them back in again, if these gentlemen have no objections, just put them in all at once. Judge, we offer these, an assortment of papers, showing the relationship between the Southern Railway Company and Southern Railway System, and New Orleans and Southeastern. Some of these Counsel, are self-explanatory. Is there any dispute that these papers are papers that are used in the local office of the Southern Railway System and by the Southern Railway employees. Is there any dispute as to that?

Counsel:

A. There is no objection to their being introduced, that they are being used in the office here.

Q. Part of your duty in your job all along has been heavy lifting, as I understand it?

A. Yes, sir.

Q. You have done heavy lifting on this job for a number of years before 1952, haven't you?

A. Yes, sir.

Q. You mentioned, Mr. Shields, Dr. Kaiser beating you with a little hammer. That was for reflexes is that right?

A. Yes, sir.

Q. That is all.

Mr. Godbold:

Q. Mr. Shields, when you go out there to unload that car, you spoke of putting up some sort of sign, or warning that the car is being unloaded. The car never moves from the positon where the Atlantic Coast Line puts it, does it?

A. No, sir, that is right. It stays there.

Q. It is on the Atlantic Coast Line track, isn't it?

A. Yes, sir.

Q. The Atlantic Coast Line puts it there. The Atlantic Coast Line moves it, doesn't it?

A. Yes, sir.

Q. Does Tank-Kar Oil Company own that track?

A. No, sir.

Q. Does anybody own it other than the Atlantic Coast Line?

A. No, sir.

Q. You just go down there and work on that track, don't you?

A. Yes, sir.

Q. How far up, we hav to establish this: How far up in the air was that board in the air that you fell from?

(Dr. Smith's testimony was taken at this time, but was omitted by stipulation of counsel for parties).

JOHN N. POOL, being called as next witness, being duly sworn testified as follows:

Direct Examination.

By Mr. Godbold:

Q. Will you state your name?

A. John N. Pool.

Q. What is your occupation, Mr. Pool?

A. I am at the present time store keeper for the Hazel Atlas Glass Company.

Q. Were you formerly a railroad man?

A. Yes, sir. I had twenty-five years of it.

Q. What line were you with?

A. The Atlantic Coast Line.

Q. What was your job on the railroad, Mr. Pool?

A. Well, I worked in the shop for several years, and I worked for the last few years I was car inspector in the yards.

Q. Mr. Pool, in the performance of those duties as car inspector of the Atlantic Coast Line for seven years I will ask you whether or not based on that experience are you familiar with what sort of inspection it takes to make a reasonable and proper inspection of a tank car?

A. Yes, sir.

Q. Now, in the process of making an inspection of a tank car, in an inspection of the safety appliances on that car, can that be made by visual inspection from the ground?

A. We measured it. It is ten feet, right at ten feet.

Q. From the ground to the board?

A. Yes, sir.

Q. How tall are you, Mr. Shields?

A. Six feet.

Q. I believe you told us when you fell, that your foot caught and that you swung down and hit shoulder and head first?

A. Yes, sir.

Q. You swung through six feet on to ten there and hit the ground?

A. Yes, sir.

Q. Mr. Shields, counsel for the Defendant, is making an issue here of when you filed this suit, and of what you have done after you filed suit. Now, your last trip to Dr. Smith was on May 5, 1953, was it not?

A. Yes, sir.

Q. Was it Dr. Smith who suggested to you that you put yourself in the care of an orthopedic man?

A. Yes, sir.

Q. After you left Dr. Smith's office, that day did you come to my office for the first time?

A. Yes, sir.

Q. An I am going to ask you whether or not you were advised on that occasion that that particular day was the last day you could file suit?

A. Yes, sir.

Q. And we did file it that day, did we not?

A. Yes, sir.

Q. Did you have any chance to see an orthopedic man or take X-Rays or do anything else, between the time you left Dr. Smith's office and the time you came to my office on the remainder of that day?

A. No, sir.

A. Not a thorough inspection, no, sir.

Q. Now, I ask you about this board at the top here, shown to be dangling on Plaintiff's Exhibit No. 1, and in the inspection of tank cars, under the proper procedure, do you get up where you can see the top of that board, or do you observe it from the ground?

Mr. Hinson:

A: We object to that. We think the question is whether or not that board is covered by the Act, Your Honor. That gets back to the same question he tried to bring up with Mr. Kelley.

The Court:

For the present, I overrule the objection.

We object to his testimony unless you ask him what kind of inspection is that inspection for the carrier who is furnishing the car.

The Court:

He expects the evidence to show what would be an improper inspection. There has been no evidence so far as to any inspection. I sustain the objection.

Mr. Godbold:

That is all for the present, Mr. Pool.

(At this time an Interrogatory was read.) Southern Railway Company.)

Mr. Godbold:

Judge, we would like to recall Mr. Pool at this time.

Q. As a matter of fact, you were in my office late in the afternoon of that day?

A. Yes, sir.

Q. And it was not until that day that it had been suggested that you see an orthopedic man, had it?

A. No, sir.

Q. As to the question of extra help. Before the accident you hired extra help sometimes, did you not?

A. Yes, sir.

Q. After the accident you hire extra help sometimes do you not?

A. Yes, sir.

Q. I ask you whether or not, since the accident, it is from time to time necessary for you to employ extra help to do work, which before the accident, you did not?

A. That is right.

No further questions.

Re-Cross Examination.

By Mr. Hinson:

Q. Mr. Shields, on May 5, you went to Dr. Smith, he was the who suggested that you file suit, wasn't he wasn't he?

A. No, sir.

Q. Didn't you testify as to that. You went straight to the lawyer, didn't you?

A. I went that day, yes, sir.

Q. That was the last day on which you could file suit, as you knew, didn't you?

A. No, I don't remember whether I knew about it or not. Or if it just happened so that I did it that day. I didn't know until I talked to the lawyer.

Q. And it was all after that last day that you went to Dr. Smith and had these X-Rays made and had these traction treatments and all?

A. Yes, ir.

That is all.

The Court:

We will have a recess at this time—You may go until fifteen minutes to 2:00 o'clock. All be back at that time, (1:45).

J. B. KELLEY, being called as a witness, being duly sworn, testified as follows:

Direct Examination.

By Mr. Godbold:

Q. Give us your name, please, sir.

A. J. B. Kelley. Joseph B. Kelley.

Q. Do you live here in Montgomery?

A. Yes, sir.

Q. You are a retired railroad man, are you not?

A. Yes, sir.

Q. What was your experience in the railroad business, Mr. Kelley?

A. I was Division Train Master for something over twenty-five years.

Q. With what line, sir.

A. Southern Railway.

Q. You are not employed by the railway at the present time?

A. No, sir.

Q. How long have you been retired?

A. Since 1950.

Q. Mr. Kelly, tell me this, as Divison Train Master in general what did your duties consist of?

A. I was in charge of the operation of trains, movement of cars, between points, managing the railroad, teaching and enforcing the operating rules and such as that.

Q. I will ask you whether or not part of your duties had to do with teaching and enforcing the requirements of the law known as Safety Appliance Act?

A. Oh, yes.

Q. Mr. Kelley, what is a penalty defect in railroad practice and procedures?

A. It is the safety appliance that is not in proper working order.

Q. What do you mean by safety appliance? In general, what is a safety appliance?

A. A safety appliance is an appliance that is put on a car or engine to be used by people, employees, or others, who are working on or around about a car or engine, such as grab irons, brake wheel, or running board, or brake platform, such appliances as that.

The Court:

Doesn't the Act itself or these regulations of the Interstate Commerce Commission make pretty clear what an appliance is under the Act?

Mr. Godbold:

Under the ICC Act of the Interstate Commerce Commission it sets them out exactly, Judge. The Act itself sets them out.

(Discussion.)

Mr. Godbold:

Q. Mr. Kelly, I show you here a photograph of the tank car marked Plaintiff's Exhibit No. 1, and I refer you to the shorter board here at the top, which is shown in a broken and dangling condition, and I ask you whether in your twenty years of experience on the railroad that has all the time or some of the time, been referred to as a running board?

A. Yes, sir, I have heard that many times. I have also heard it called a dome running board and I have also heard it called a dome platform.

Q. In your twenty years of experience with the Southern Railway, has that item been consistently treated as a safety appliance?

A. That has always been my understanding, yes, sir.

Q. And when that item is defective has it in your experience been tagged as a defective safety appliance?

A. Yes, sir, with a red tag.

Q. You tag a defective safety appliance with a red tag?

A. Yes, sir.

Q. Do you use the same color of tag for a defective appliance on a car which is not a safety appliance?

A. No, sir.

Q. What color of tag do you use for that?

A. Just an ordinry white tag with black lettering.

Q. In your experience on the railroad Mr. Kelley, have you ever seen an employee of a railroad standing on, or using that board at the top there that you have said you have heard many times called a running board?

A. Yes, sir.

Q. For what purpose do the employees of the railroad use that running board?

A. I have seen train crews use it to get up there where they can be in view and pass hand signals, and I have seen dome covers work loose on tank cars en route and they would have to get up and use this board to stand on while they made temporary repairs or adjustments on them.

The Court:

It is only used on tank cars, isn't it?

A. Yes, sir.

Q. In answer to the Judge's question, a box car has a running board that runs across the top, hasn't it?

A. Yes, sir.

Q. Mr. Kelley, with reference to another issue that has come up in this case, I ask you if you can identify this document?

A. Yes, sir. That is a report of the Southern Railway. In other words, it is a notice of the next stockholders meeting to be held after the date of this letter, which is March 25, 1953, it gives various information about the people who are to be elected as Directors and various other items that is to be brought up at the stockholders meeting.

Q. Where did that come from, Mr. Kelley?

A. I gave it to you myself.

Q. Did you receive it through the mails?

A. Yes, sir.

The Court:

Q. Who is it addressed to?

A. It is addressed to the Stock Holders of the Southern Railway Company, Judge. It contains the Southern Railway System emblem on it, as well as the Southern Railway Company name, and it contains within it certain data revealing that the officials and officers of the Southern Railway Company and the officers of the Northeastern are one and the same people, and that all of them contribute to the salaries.

The Court:

Mr. Godbold, I have ruled on that once, and I am going to stick to that ruling and the burden is going to be on the defendant to show me that they are different.

Mr. Godbold:

No further evidence on that particular part, your witness.

Cross Examination.

By Mr. Stewart:

Q. Mr. Kelley, I believe you testified that this platform board which is in issue here, you have heard referred to as a running board, a dome platform and top running board?

A. I have heard it by each definition.

Q. What do you yourself refer to it as?

A. I always refer to it as the top running board.

Q. What do you call this board here that goes around the car?

A. The bottom running board. In that case there because the car is equipped with two of them. In the case of a box car they would only have one running board, because there is only one on it, and that is on top of the car.

Q. Now, if a trainman, you testified the act was passed for the benefit of the trainmen, in the operation of a train, is that right?

A. Not necessarily for trainmen, but for any employee that has to work on or about that car.

Q. Any employee of the railroad?

A. I suppose it is for railroad employees. I don't know about other people.

Q. If there was a box car on this side of this tank car and one here and a trainman had to come from this end of the box car and cross over to here, to get to this box car, which we imagine will be here. How would he make that transverse across that car?

A. He would come down here from the top of the box car and step on that running board there and walk along it to the next car and then go up the ladder to the top of that.

Q. So the running board you speak of as the bottom running board is for the benefit of the ordinary use of the trainmen when moving from one point on the train to another, is that right?

A. Naturally it would be used because the top one doesn't reach from one car to the other.

Q. I believe you testified that this board was required by the act as a safety appliance?

A. I testified it was my own opinion that it was.

Q. Aren't you familiar with all the tank cars which are not so equipped that don't have a running board?

A. Yes.

Q. Then you have seen cars in the last twenty-five years without the running board on top?

A. Yes. I have seen them with a platform all around the dome up there.

Q. But have you also seen them without any kind of appliance up there?

A. Yes.

Q. If you had in your business with the Southern in your work had seen such a car and you were in the process of supervising a car inspection what would have been your order that you would have placed on a car that didn't have any kind of platform up there?

A. Well, I would like to explain to you there that I didn't have general supervision of the car inspectors or car repairmen. They usually work in shop yard. And of course, my work was on the road.

Q. But you are familiar with this type of appliances, though?

A. Yes, sir, I am.

Q. The point I am making is if the car was not equipped with a safety appliance at all around this dome, what would be your opinion, as you testified you knew what the act was for, what would be the type of order, and I believe Mr. Godbold brought out that you knew the difference between a white order and a red order, what type of order would be issued on that car?

A. If it is not equipped with any safety appliance there would be no report to be made on it.

The Court:

Q. If it was required it would have been your duty to have reported it to someone, would it not?

A. You mean if the ICC required that they be equipped with it. I suppose so, but I don't know that the ICC does require that. It is my understanding that when a car is so equipped with a safety

appliance then it must be maintained in proper condition.

Q. Are you familiar with what the law requires in this safety appliance Act., Section 11, and Section 12, requires what in the way of safety appliances?

A. I don't know. No, sir.

Q. Are you familiar with the ICC regulations which implement, and with the administrative agency which enforces the operation of this law?

A. You mean, do I know all the requirements of the ICC laws?

Q. With regards to safety appliance act?

A. No, I would not know all of them.

Q. Do you know them in regard to running boards, on similar tank cars?

A. I do know the law specifies how they shall be attached, and what thickness they will be, and how they will be constructed, and such.

Q. Do you know whether or not the law or regulations require that one be around the top of this dome?

A. I can't say that.

I have no further questions.

Mr. Godbold:

Q. As I understand your testimony, Mr. Kelley, you are not testifying as a legal expert, are you?

A. No, sir.

Q. Nor are you testifying as an expert on ICC regulations?

A. No, sir.

Q. Your testimony was directed to what is treated as a running board and is called a running board, and your experience on the railroad?

A. Yes, sir. That is exactly right.

The Court:

Tell him to come back in.

Mr. Godbold:

Q. Mr. Pool, you are the same witness whose testimony was stopped a few minutes ago.

A. Yes, sir.

Q. Mr. Pool, in your experience with inspection of railroad cars, I will ask you whether or not you can make an inspection of this running board, without getting up where you can see the top of it?

Mr. Hinson:

Your Honor, we object to that question because he has not qualified him as to whether this is inspection of the car that was turned over to a switching carrier responsible for unloading it, or such an inspection as to be made by the railroad or car furnishing company, that furnished the car for loading.

Mr. Godbold:

Mr. Pool, when a car comes in to a delivering carrier, that is coming from somewhere else, consigned to a consignee in Montgomery, Alabama, to be unloaded in Montgomery, Alabama, and is handled, in Montgomery, Alabama by the delivering carrier, are you familiar with the kind of inspection which will be performed by the car inspectors of the delivering carrier, namely, the Atlantic Coast Line, your former employer, to determine whether that car is in a safe condition to be unloaded?

A. Well the car should be given a thorough inspection for all defects, as well as safety appliance defects.

Q. Now, in the process of making that car inspection, that thorough inspection of all defects, including safety appliance defects, can you as a competent car inspector, determine whether that top running board is safe to stand upon, and in a safe and sound condition, without looking at the top of it?

A. No, you can't.

Q. I will show you another photograph, Plaintiff's Exhibit No. 2, showing the tops of that particular running board after it broke. I ask you whether based on your seven years' experience as a car inspector, and in making the kind of inspection just referred to in the last preceding question, and based on your observation of the condition of this board, and the cracks in it, with particular reference to the crack nearest you, whether that board is in a safe conditon, in your judgment and opinion, in order that the car be unloaded?

A. No, it would not.

Q. Now, has your experience included, Mr. Pool, an inspection of cars by the originating carrier? Where the shipment was being originated, we will say, in Montgomery, Alabama, and going to New Orleans, La., are you familiar with the inspection that would be made here in Montgomery before that car leaves?

A. The car should be inspected before they are loaded. Yes, sir.

Q. Does that, I ask you whether based on your experience, inspection which is given the car before it is loaded includes a determination of whether or not a car is safe for unloading at the other end?

A. Well, each junction point should inspect the car, which they do.

Q. Junction point, you mean when it passes from one railroad to another?

A. Yes, sir. Interchange, we call it.

Q. I am not talking about that. I am talking about the obligation of the originator carrier. When an originating carrier furnishes a car to be loaded, it is loaded at that time and sometime and somewhere that car has to be unloaded. Does it not?

A. That is right.

Q. Well, now, in inspecting that car when it is given to the originating carrier for loading, are you familiar with that sort of inspection?

A. Well, of course, a car should be in first class shape before it is loaded or it should be put in the plant.

Q. Does that include an inspection of the loading and unloading devices?

A. That is right.

Q. Does that include inspection of that board there, I have just referred to at the dome that is called a running board?

A. That is right. It includes also that complete car.

Q. How many years were you with the railroad, Mr. Pool?

A. From 1919 to 1948, something like twenty-five years.

Q. In your experience what is that board there at the top below that dome there, called?

Mr Hinson:

We object.

The Court:

I think it is purely a question of law as to whether it is within the scope of a definition of a safety appliance. Overrule.

Mr. Godbold:

We except.

I have no further questions.

Cross Examination.

Mr. Hinson:

Q. Mr. Pool, you say you have inspected cars for the delivering carrier when they come into Montgomery to be turned over to the consignee?

A. Not from the delivering carrier, because we didn't have any carriers, it was interchange.

Q. Well, interchange, to be turned over to the consignee?

A. Yes, sir.

Q. And the type of inspection which you made of a cut of cars, usually you have a long cut of cars in the yard to inspect, don't you?

A. That is right.

Q. When you make that inspection of a car such as this, in interchange, or when it is to be turned over, not when he furnishes the car—I mean when it is passing through to be turned over to another railroad, or to be delivered to the consignee do you make that inspection of the car. Isn't it as a matter of fact, a ground inspection. Don't you go around the car and look at the car?

A. Yes, but you also look up at that running board there.

Q. All right. You look up there, don't you?

A. Yes, sir.

Q. And where it shows a crack in the end and things of that kind, defective, you had better go up there and see about it.

Q. All right, sir. Let me ask you this. If there is nothing apparent when you look up at it from the ground, if there is no appearance of anything wrong, you don't do anything about it, do you?

A. Well, of course, if the running board looks all right, I do not. But you are taking a chance when you don't do it. You are taking a terrible chance on yourself, if you don't do it. You are putting yourself liable for trouble.

Q. Let me ask you this, do you ever go up and take that running board and hit it with a hammer when they look all right from the ground. Do car inspectors do that?

A. I have been on many a one.

Q. It that the general custom of car inspectors?

A. Yes, sir.

Q. For any car in for interchange, or delivering carrier, to be inspected to climb up on it and hit that running board, whether it looks bad or not, is it the custom for them to go up there and hit it with a hammer?

A. They don't hit it with a hammer, no.

Q. How do they inspect it. Do they jump on it?

A. They are supposed to walk all running boards and examine them, and see if it is well secured and not be cracking.

Q. You tell this jury that any inspection of these cars in interchange, cuts of cars such as this, that the custom is for the car inspector to get up there

and walk all running boards of cars they have to inspect?

A. That is correct.

Q. That is the custom?

A. Yes, sir.

Come down.

Col. Rushton:

Q. May I ask a question, please. I want to ask a question about this picture. Will you come over here in front of the jury.

A. Yes, sir.

Q. You never actually saw that board until after this accident, did you?

A. No, sir.

Q. In your opinion, how far from this end of the board was that crack?

A. I imagine it was four, five, or six inches from the end.

Q. Now, the hole he said he saw there, was the hole there after the board was broken?

A. Yes, sir.

Mr. Godbold:

Q. One other question, Mr. Pool, you are no longer employed by the Coast Line Railroad, are you?

A. No, sir.

Thank you, that is all.

Mr. Godbold:

Judge, Dr. Kaiser phones us about fifteen minutes ago that he was on the way. He has not arrived. We rest our case, with the right to put Dr. Kaiser on when he comes.

(Dr. Kaiser, the next witness, testified, his testimony being omitted at request of Counsel.)

The Court:

Gentlemen, we will not cross examine the witness now. It is quitting time. You may go now until 9:30 tomorrow morning.

February 24, 1954.

The Court:

The jury is here, but Dr. Kaiser has not arrived yet. I don't know how long he may be in getting here. Do you Gentlemen have any objection to postponing his cross examination.

I will make this announcement for the benefit of attorneys on both sides. I have spent some time on this motion for the Southern Railroad, and I have decided that I should hear the evidence on that proposition. I guess it would not be out of order to hear that evidence and when it is in, I would be in a position and would give a ruling on that particular phase of the case. On that phase of the case, call your first witness.

WILLIAM H. LUCKETT, being called as a witness, being duly sworn, testified as follows:

Direct Examination.

Col. Rushton:

Q. Mr. Luckett, what are your initials?

A. William H. Luckett.

Q. Where do you live?

A. In Washington, D. C.

Q. Are you an employee of the Southern Railroad?

A. Yes, sir.

Q. What is your position in connection with that railroad?

A. I am General Auditor of the Southern Railway Company, and each and all of its systems and affiliated companies.

Q. How long have you held that job?

A. Since February 1, 1932.

Q. How long have you been in the employ of the system?

A. Since August 10, 1899.

Q. In other words, you have been in this business for about fifty years?

A. Yes, sir.

Q. Are you thoroughly familiar with the organization and the component parts of it, how they keep their books, and how they do business?

A. Yes, sir.

Q. When was the New Orleans and Northeastern Railroad chartered?

A. In 1870.

Q. When was the Southern Railroad chartered?

A. In 1894.

Q. In what State was the New Orleans and Northeastern chartered?

A. In the State of Louisiana.

Q. In what states was the Southern chartered?

A. In the State of Virginia.

Q. Have those charters been maintained and are now in operation?

A. They are.

Q. Has the New Orleans and Northeastern its own stock, and if so do you remember in round figures how much it is?

A. Yes, sir. It does have its own stock. I would like to refer to my papers.

Q. Can you tell us in round figures?

A. About five or six million dolars.

Q. And the Southern also has its own separate stock?

A. Yes, sir.

Q. And that is, in rough figures, how much?

A. One hundred and eighty and some odd million.

Q. Doesn't the Southern have control of the stock of the New Orleans and Northeastern Railroad?

A. Yes, sir.

Q. It owns how much of it?

A. All of it.

Q. Are there any Directors of the Companies?

The Court:

What do you mean by control. Do they own all of the stock?

A. Yes, sir.

Col. Rushton:

Q. Are any of the Directors of the NO & NE also Directors of the Southern Railroad?

Mr. Godbold:

Your Honor, we are going to object to this. Col. Rushton yesterday made objections directed at the point that this investigation of organizations would have to be directed to the time of the accident. We have no objections to investigation now, if it is agreeable to—

Col. Rushton:

I just want to say the organization has been the same as it was in May, 1952.

A. In May 1952, Mr. Harry A. DeBotts, was President of the NO & NE Company. He was a Director of both companies. He was the only common director of these companies.

Q. All the other Directors were different persons?

A. Yes, sir.

Q. And no other Director of the NO and NE was also a Director of the Southern?

A. No, sir.

Q. And no other Directors of the Southern was also a Director of the NO and NE?

A. That is true.

Q. Now, you are the Auditor of the whole system?

A. Yes, sir.

Q. Are you familiar with the way in which the system handles its bank account and its money?

A. I am.

Q. Do the two railroads have separate bank accounts?

A. They do.

Q. Do you remember off hand what banks the NO & NE keep their money?

A. NO & NE have several depositories, Washington, New York, Cincinnati, New Orleans, Meridian and Hattiesburg, I believe.

Q. And the Southern, of course, has its own bank account in what places?

A. All over the Southern Railway lines but not at any point off the Southern lines except in the city of New York. It has no bank account in New Orleans or in Louisiana.

Q. Where do the Southern lines run, is so far as a terminal in the direction of this shipment? You are familiar with the shipment we are talking about?

Mr. Godbold:

We object unless he specifies whether he is talking about the Southern Railway Company or the Southern Railway Company or the Southern Railway System.

Mr. Rushton:

You are quite right. I am inclined to say Southern Railway Company, because those are the two that we have been talking about here. There are of course, many other railroads that are also in the System, but it was between these two, the Southern and the NO & NE where this shipment originated. How much of the railroad of the Southern was in that transit?

A. From Akron, Alabama to Selma, Alabama.

Q. Does the Southern have any railroad tracks any stations or any actual physical property anywhere any further south than Akron, Alabama? involved in this suit?

A. Not in the direction of New Orleans.

Q. Where does the Southern Railroad end in the direction of New Orleans?

A. In the vicinity of Akron, but the Southern Railway has a line into Mobile and in Birmingham, and Jacksonville, Florida, Charlestown S.C., and into

East St. Louis, Illinois. It operates in the States of Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Tennessee, Kentucky Indiana and Illinois.

Q. It does not operate in Louisiana?

A. No, sir.

Q. Does the NO & NE collect its own freight and its own passenger rates?

A. Yes. Wherever the shipment originates on the NO & NE and is a prepaid shipment or terminates on the NO & NE, it is a collect shipment. Then NO & NE collects its own money.

Q. Does it pay its own employees?

A. Yes, sir.

Q. Does it pay specifically the track walkers who maintain this railroad?

A. NO & NE pays all of its employees from the Superintendent down.

Q. Does it specifically pay its own engineers, firemen and inspectors of cars?

A. It does.

Q. And it is paid out of its own revenues obtained in the manner you told us about?

A. Yes, sir.

Q. And on its own checks?

A. Yes, sir.

Q. When it has an account against the Southern for things it has done for the Southern by way of collecting any of its part of the orders, if any, as it would any other railroad, and when the Southern has charges against it,—How often do they balance the books?

A. Monthly.

Q. And are the balances actually paid money or checks?

A. That is right.

Q. In other words, if one of them owed the other for something, you have a monthly square off in which each of them pays the other?

A. Yes, sir. That is right.

Q. Now, when equipment or cars are bought for use on the lines, does the NO & NE buy its own cars?

A. The NO&NE buys freight cars, locomotives, but it does not buy passenger cars. Its cars, like all freight cars, are operated interchangeably between railroads. When NO & NE are using a car owned by another railroad, Southern Railway Company, Pennsylvania Railroad Company, L & N, they pay the established rental for them.

Q. What is the situation in reference to the tank cars, such as this, which was owned by the shippers, do they pay a rental on that?

A. With respect to the tank cars and the freight cars, they are settled in what is known as the Southern Railway System account by Southern Railway Company, and Southern Railway Company bills the NO & NE with its mileage proportionately.

Q. Just as NO & NE bill the Southern?

A. Yes, sir.

The Court:

Q. I don't think you have answered the question yet, if the NO & NE needs new cars, who buys them?

A. The NO & NE has bought some of its new cars. You see, these cars, Your Honor, are operated in a pool. All of the Southern Railway System Companies buy their share of cars for this pool and they operate it and then a record is kept of the days,

the number of days on each line on which these cars are located.

Q. This NO & NE line the cars are all handled through that pool?

A. Yes, sir. These cars may go to Canada, you know. They may go to the Pacific Coast.

Col. Rushton:

The same thing would be true of the L & N system?

A. Yes, sir.

The Court:

Q. If a car gets out of repair and needs repairing, who bears the expense of it?

A. The owner. If it is an NO & NE car he bears the expense of it, and whoever repairs the cars bills the charges against them, for it.

Col. Rushton:

Q. Is it a fact with reference to freight cars, they are all used as is most convenient by all railroads?

A. Yes, sir.

Mr. Godbold:

We are going to object to counsel leading the witness.

Col. Rushton:

I couldn't lead this witness, because he knows more about this than I do. I am just trying to get out the facts as quick as we can.

Q. Is it true that all the freight cars and passenger cars in the United States has the same gauge and can be used over all railroads.

Mr. Godbold:
May I interpose the same objection.

The Court:
That was pretty leading but I overrule the objection.

Mr. Godbold:
We except.

Col. Rushton:
Q. There are some few narrow gage railroads and they have their own narrow gage locomotives and cars, that are not interchanged with other railroads. They stay right there.

Q. But isn't this true, whenever any car comes on any line of railroad, for use by that line of railroad they pay a rental for it.

A. That is right.

Q. That is paid by each railroad company?

A. The Association of American Railroads fixes the rental rate and that is submitted to the Interstate Commerce Commission. The present rental rate for freight cars is $2.40 a day.

Q. Suppose the NO & NE buys some freight cars and puts up its own money for them.

A. Yes, sir.

Q. It buys it for its own use, that car might be shipped over any railroad in the United States?

A. That is right.

Q. And while on its lines it is used for revenue purposes and on other lines they get $2.40 a day?

A. That is true.

Q. And that would be true if it went over the Southern or L & N or any other railroad?

A. That is right.

Q. Now, as to claims, for personal injury does each of these railroads pay its own claims or does one pay for the other?

A. You are speaking of personal injury claims. Each railroad pays its own claims. With respect to claims for damaged goods, under the law, the shipper, or consignee, can claim against any partner shipping, and the line that settles that claim distributes the amount among all the interested railroads.

Q. In other words, it is all one railroad, under the law, when it comes to damaged freight.

A. Yes, sir.

Q. But as to personal injury why each railroad, particularly with reference to the Southern and NO & NE, as you testified.

A. Each company pays its own claims, settle their own claims.

Q. Is the NO & NE a solvent institution?

A. It is.

Q. I believe you said it was incorporated, do you remember the year?

A. 1870.

Q. Do you remember the year when Southern announce ownership of it.

A. The Southern acquired some stock in NO & NE from year to year but it acquired control in 1916.

Q. That has been the situation since then?

A. Yes, sir.

Q. I will show you here some of the Southern Railway system literature. What is the Southern Railway System, just to ask you a general question. Maybe you can enlighten us.

A. The Southern Railway System is not a corporation, it has no corporate existence. That may be termed we will say a trade mark or trade name. It is used to describe a group of separate railroads that operate under a common management and controlled by Southern Railway.

The Court:

Does that include all the affiliated lines that are jointly owned by the Southern Railroad Corporation?

A. Not all of them, no, sir. The lines that are in the group known as the Southern Railway System consists of the Southern Railway Company, The Alabama Great Southerner, which operates from Chattanooga, Tenn., to Meridian, Miss., the NO & NE Railroad Company, which operates from Meridian, Mississippi, to New Orleans; The Cincinnati, New Orleans, and Texas Pacific, which operates from Cincinnati, Ohio to Chattanooga, Tennessee; and the Georgia, Southern and Florida, which operates from Macon, Georgia, to Jacksonville, Florida. And then there is the New Orleans Terminal Company, and the St. John's River Terminal Company, which is a terminal located in Jacksonville, Florida. Then the Southern owns or controls a number of other small railroads that are not included in the system.

Q. Does the Southern Railway System publish any literature, or on occasions solicit any traffic or things of that sort, in different parts of the world?

A. The Southern Railway System—does have a lot of literature published under the caption of Southern Railway System, and the cost of it is prorated between each of the companies in the system as I have just described.

Q. Each one pays its own proportion?

A. The advertisement is in proportion to gross revenue of each company.

Q. How are these issues for solicitation of traffic, for example the ones here in Montgomery, how are they paid?

A. They have a statistical unit in railroading known as ton miles.

Q. That means the number of tons hauled one mile?

A. Yes, sir. One ton hauled one hundred miles a hundred ton miles. The freight and traffic people get business, their expenses are distributed among Companies on the basis of ton miles. The passenger is on the basis of passenger ton miles. The man with a joint freight and passenger representative his thousands of tons is proportioned on a combination of ton miles and passenger.

Q. Who actually issues the check that pays that kind of a representative?

A. The Southern Railway Company.

Q. Is it reimbursed for that?

A. Yes, monthly.

Q. Monthly in proportion and verified?

A. Yes, sir.

Q. Does the System publish various different kinds literature in which it shows this division of the system into the various component railroads?

A. Yes, sir.

Q. I will show you such a map and it has already been introduced in evidence, and I will ask you to point out places where the NO & NE are shown to be a component part of the system?

A. It is from New Orleans to Meridian, Mississippi, from New Orleans in a Northeastern direction to Meridian, Mississippi, that is as far as the map shows.

Q. And in all the literature that speaks of the Southern Railway System on the passes that are issued, isn't it a fact that each one of them shows a breakdown of the companies that are a component part of the system?

A. That is true. They have a number of pieces of stationery headed Southern Railway System. Such as letter heads. That does not have the name of each company printed on them. But in our account right here, we pay money for either one of these companies, separately and collect any money due, we don't use the Southern Railway System stationery, we use the stationery for each of the companies.

Q. Is that true of all the activities of the Southern Railway System?

A. Yes, sir.

Q. Now is the Southern Railway itself one of the component parts of that system?

A. That is true.

Q. And what you said with reference to its being separately chartered, keeping its own sets of books, and its own separate existence as a corporation. That is true also of the New Orleans and North Eastern?

A. Yes, sir.

Q. Would Your Honor like to ask this witness any questions?

The Court:

Q. I would like to ask this question. If the Southern Railroad Corporation pays a dividend to its stockholders, and if they pay a like dividend to the stockholders of this NO & NE?

A. No, sir. The New Orleans and North Eastern Railroad Company of course, has its separate stock.

Q. Yes, but the Southern Railroad Company owns it all?

A. Yes, but there are no stockholders of the NO & NE except the Southern Railway Company, and the qualifying shares, and they are owned by Southern Railroad Company.

Q. Well, for the amount of stock they owned in the NO & NE they have been issued a corresponding amount in the Southern Railway Company, is that correct?

A. No, sir.

Col. Rushton:

Your Honor, there has been no consolidation. All this stock owned—

The Court:

That is what I am trying to get at. Whether there has been in fact any consolidation in the operation of these companies.

A. No, sir. There has been no consolidation.

Q. Who determines whether there should be a dividend taken by the stock holders of the NO & NE?

A. The Directors of the NO & NE would make that determination.

Q. They have a separate board of Directors and they are paid out of the earnings of the Southern Railway Corporation?

A. Yes, sir. It so happens that the NO & NE has not paid dividend for years.

Q. I am not very familiar with all railroad operation but that may be true of the Southern.

A. No, sir. The Southern is paying dividends.

Q. When they do pay a dividend they don't also pay a like dividend to this NO & NE?

A. No, sir.

Col. Rushton:

Q. I will show you here a document of 1952, called the 69th report of the New Orleans and Northeastern Railroad, and ask you if you are familiar with that document?

A. Yes, sir, I am familiar with it.

Q. I show you the Annual Report of the Southern Railway, was that for the same period?

A. Yes, sir.

Q. This is 1952, are you familiar with those?

A. Yes, sir.

Q. And they substantiate what you have said with reference to these separate accounts and separate money.

A. Yes, sir. These are reports of stockholders and include a list of the Directors.

Q. Well, I don't think there is any reason for naming them. Is it a fact that Mr. DeButts is the only common Director of them both and the others are entirely separate?

A. That is true.

Q. And when a dividend is to be declared by the NO & NE the Directors are the ones who determine that?

A. Yes, sir.

Mr. Godbold:

Q. Does counsel want to offer those in evidence?

A. We would be glad to offer them. Call that SR Exhibit No. 1.

(Received in evidence and marked SR Exhibit No. 1.)

Q. Was there anytning you wanted to comment on?

Mr. Godbold:

Judge we are going to object to that. I don't mind him leading just a little bit but handing him a report and asking him for his comment is certainly improper.

The Court:

Sustain the objection.

Col. Rushton:

When I was taking the exhibt he was about to say something, he had his finger on it, and I just asked him that.

Q. What is the New Orleans Terminal Company?

A. The New Orleans Terminal Company is local terminal company at New Orleans. It owns a passenger station which will disappear within the next few weeks.

Q. I am talking about in 1952?

A. It owned a passenger station, it owned freight stations, water terminal, tracks and performed local switching services for itself and served engines located on its lines and for the New Orleans and Northeastern Railroad.

Q. You said it was separate?

A. Yes, sir.

Q. Its stock is owned by what company?

A. In May 1952, its stock was owned by Southern Railway Company.

Q. Since then is it owned by NO & NE?

A. Since then the Southern Railway transferred and sold the NO & NE.

Mr. Godbold:

Judge, we object to that. The Southern Railway was in control at the time of this accident.

The Court:

Any transaction that occurred since the date of this alleged accident is not pertinent.

A. The Southern Railway Company owned all capital stock of the New Orleans Terminal Company.

Col Rushton:

Q. Is that a separate corporation?

A. Yes, sir. It is under the laws of the State of Louisiana.

Q. Has it substantial capital?

A. Yes, sir.

Q. Does it pay its own employees, including inspectors of cars?

A. It does.

That is all.

Cross Examination.

By Mr. Godbold:

Q. Mr. Luckett, your position with the Company was what?

A. General Auditor for the Southern Railway Company and about twenty of its affiliated companies, including the New Orleans and Northeastern Terminal Company, and Alabama Great Southern.

Q. You are general auditor for all the affiliated lines of what is known as the Southern Railway System?

A. That is true.

Q. Who pays you, Mr. Luckett?

A. The Southern Railway Company.

Q. What contribution to your pay do these other affiliated lines donate, if any?

A. They contribute an amount to my salary and the entire accounting expense in relation to gross revenue.

Q. I see. In other words, you have on accounting department for all the lines of the Southern Railway System, one common accounting department?

A. Yes, sir.

Q. And in that common accounting department you then separate out these funds in the way you have described?

A. Well, we don't separate them out. A good many of the funds we have talked about come to each of the companies direct.

Q. I mean separate them out in the sense of book entries? You do that in your common accounting?

A. Yes, sir.

Q. I see.

Q. Then they have separate books for each of those companies.

Q. I see, but they are all kept in the common department?

A. All are kept in one office building.

Q. And that is the common department, isn't it?

A. I don't know what you mean by common.

Q. Those are your words, sir. You testified that you maintained a common accounting department for all of the lines in the Southern Railway System. Would you explain that to us, please, sir.

A. I don't think they are my words. I said we have one accounting department.

Q. Yes, sir. And that keeps the records for all of the lines?

A. That is right.

Q. Now, you and the other personnel in this accounting department for all of the lines, are paid by the Southern Railway Company, are you not?

A. Directly.

Q. And the Southern Railway Company, after it has spent its funds, in turn collects partial reimbursement from each of the other lines in the Southern, does it not, every month?

A. Yes, every month.

Q. But the funds you are paid with are Southern Railway Company funds?

A. That is right.

Q. Now, Mr. Luckett, I would like for you to give the jury some idea of the comparative size of these affiliated companies which maintain this one accounting department. The Southern Railway Company maintains over six thousand miles of lines, does it not?

A. That is true.

Q. And the New Orleans and North Eastern maintains only about two hundred miles, does it not?

A. Something like that.

Q. As a matter of fact the total lines of the Southern Railway System including all the component parts thereof, the total trackage runs roughly some 7500 miles, doesn't it?

A. Yes, approximately.

Q. And of that approximate 7500 miles the Southern Railway Company operates about 6200, doesn't it?

A. That is true.

Q. And the other approximately 1300 miles is maintained by seven other affiliates of the Southern Railway System?

A. I did not count them.

Q. There was the Cincinnati, and New Orleans, Alabama Great Southern, NO & NE; Georgia Southern and Florida, Terminal and North Eastern, New Orleans Terminal, and St. John's River Terminal. That is all.

A. Yes, sir.

Q. So as far as trackage is concerned, the Southern Railway Company maintains numerically a dominent position, does it not?

A. So far as miles is concerned, yes.

Q. What other officers are there, who perform functions as you do for all the lines affiliated in the Southern Railway System?

A. Many of them.

Q. How many in your best judgment?

A. Not counting these traffic people you have spoken of, there is a world of them, there is about, I would say, between twenty-five and thirty.

Q. And those are the top level administrative personnel, are they not?

A. That is right.

Q. And I believe your testimony was that from Superintendent down each railroad pays its own employees?

A. That is right.

Q. From Superintendent up, who pays them?

A. The Southern Railway Company pays them directly, and collects from each of the separate corporations. That is purely a matter of efficiency in accounting.

Q. We think that is a matter of opinion, sir. Now, do I understand you right: That all of the top level officials of the New Orleans and North Eastern Railway and the New Orleans Terminal Company are paid by the Southern Railway Company?

A. Yes, that is right.

Q. And then the Southern Railway Company, in turn, collects its money back?

A. That is right.

Q. Now the President, Mr. DeButts, I believe, is President of NO and NE, is he not?

A. Yes, sir.

Q. Of what other affiliated lines in the system is he also the President of?

A. All of them.

Q. All of them. Every affiliate of the Southern Railway System, the same man is the President?

A. That is true.

Q. What about Vice-Presidents?

A. Some of the Vice-Presidents hold the same office in the different companies. But with respect to New Orleans and North Eastern Mr. H. C. Money, is Vice-President of the NO and NE, and the New Orleans Terminal Company, with headquarters in New Orleans. He is not the Vice-President of the Southern Railway Company.

Q. Now, Let me see, Mr. Luckett, if I understand your testimony about the freight cars. As I understand your testimony, all of the freight cars of the affiliated lines of Southern Railway System are handled in one common pool?

A. That is right.

Q. And when you, let say, a car is used out of that pool, by the Pennsylvania Railroad, then Pennsylvania Railroad pays the car rent on that to the Southern Railway pool, doesn't it?

A. Yes.

Q. And the Southern Railway System pool in turn submits the funds to the NO and NE?

A. That is true.

Q. As I understand your direct testimony, Col. Rushton asked you who purchased the new cars for the NO and NE, and I believe I understood your answer to be that the NO and NE buys some of its new cars?

A. Well, NO and NE buys all of the new cars. It does not buy all the cars that are used.

Q. It uses these other cars from the pool. It uses cars from the Erie, and Pennsylvania and other roads, doesn't it?

A. Yes, sir.

Q. Now, let me ask you a few questions directed at the freight solicitation agents. Those are maintained all over the territory served by the Southern Railway System, are they not?

A. Yes, way beyond that, there are some in San Francisco.

Q. At least you have got them in this area served by the system?

A. Yes, sir.

Q. Now those freight and passenger solicitation agents maintain offices with Southern Railway System on the door, do they not.

A. Yes, I believe they do.

Q. Let us take for example the Southern Railway System, down here in the First National Bank Building, here in Montgomery. It has got Southern Railway System on the door. Who pays that man down there?

A. Southern Railway Company.

Q. Southern Railway Company, as a matter of fact there are three employees down there and all of them are paid by the Southern Railway Co.?

A. That is true.

Q. But has Southern Railway Company got any name on that door?

A. I have been down there several years ago, but I don't remember that Southern Railway Company's name was on the door.

Q. I understood your testimony to be, on direct examination, that every time the System puts out any information or pamphlets or other data to the

public, using the word Southern Railway System, that it breaks down the component lines and shows who is involved?

A. We have a lease on that space in the Bank Building here.

Q. Who pays, who signed that lease?

A. Southern Railway Company.

Q. I will show you one of these pamphlets to which Col. Rushton referred and it says on there on the front it says, Southern Railway System, doesn't it?

A. That is true.

Q. On the inside back cover there is something called Freight Traffic Organization. W. M. King, Vice-President, Washington 13, D. C. Now, of what is Mr. King Vice-President of?

A. Southern Railway Company, the Alabama Great Southern Railway Company, New Orleans and North Eastern Railway Company, Cincinnati and New Orleans Texas and Pacific Company, New Orleans Terminal Company, The Georgia Southern, and St. John's River Company, and NO and NE.

Q. Now, here is another piece, called Assistant Vice-Presidents. Now are they assistant Vice-Presidents of all of these affiliated in the Southern Railway Company?

A. Yes.

Q. We are still dealing with this pamphlet called Southern Railway System. Down here it lists sales and service offices. And it lists thirty or forty towns there, at least, doesn't it?

A. Yes, sir.

Q. Is there any indication here anywhere that these are Sales and Service Offices of the Southern

Railway Company, or one of these other affiliated lines?

A. No. I have not looked at that. This is not a corporate document. This is simply a piece of advertising.

Q. That is what I want to get at. This is a piece of advertising. There is nothing in there anywhere that shows any distinction between Southern Railway System and these affiliated lines, is there?

A. No. These people that receive them would not be interested in that.

Q. Would you answer my question, please, sir.

A. No, sir.

Q. And this is the document you put out to the public, isn't it? This is not something you handle in your own accounting offices, is it?

A. This is something that the Southern Railway System Traffic Department distributes to shippers and consignees to show how long it takes a car to move from one place to another.

Q. The System Traffic Department, and they put that out?

A. Yes, sir.

The Court:

Q. I will ask the witness one more question. Is there any time when the funds of these affiliated companies that operated in this Southern Railway System are all commingled in one fund.

A. No, sir.

Q. Are the expenses of all these affiliates ever paid from any common one fund, or separately and distinct fund?

A. Well, they may be initially paid by Southern Railway Company but when the expense is prorated

among the other lines, to use as an illustration my salary. The Southern Railway Company pays me, then the Southern Railway Company bills each of these other lines in relation to the gross revenue of each of the lines. And those lines in turn reimburse the Southern Railway Company.

Q. Does that same rule apply to all the operating expenses of the Railway Company?

A. No, sir. If it is a local expense, I think—Did you have in mind the surplus of the Companies, whether that ever becomes intermingled.

Q. What I wanted to know was whether the earnings of all these companies go into one fund or are used as one fund?

A. No, they are not.

Q. And they would be diminished by whatever the operating expense would be.

A. Each affiliate has its, gets its own revenue, its own earnings. It pays its own expense, it pays its own income tax. Each one upon a separate tax return.

Q. If one of these affiliates is operating at a loss, a continued deficit, who bears that?

A. Well, it has not happened for some time. But if we have an affiliate that is accumulating a deficit and the Southern Railway Company is the principal stockholdr. The Southern Railway Company would have to finance the affiliate until they could get rid of it. Of course, if there was no hope for it, they would file application with the Interstate Commerce Commission to abondon it. We have abandoned a number of short lines.

Mr. Godbold:

Q. Now these freight and passenger solicitation agents which are scattered all over the area of the system and elsewhere, in the United States, they solicit freight and passenger traffic for all the affiliated lines in the system, do they not?

A. Yes, sir. The purpose is to get the long haul for the Southern Railway System and affiliates.

Q. Do I understand it that the Southern Railway Company, however, pays all those people?

A. Yes, and prorates the expense and collects the money from each.

Q. All of the affiliated lines of the Southern Railway System employ a good many common forms do they not?

A. Yes.

Q. These are common forms for use of all the affiliated lines, is that right?

A. Yes, sir.

Q. I show you here a document, not very important, in the conduct of railroad affairs, which is a requisition for postage stamps.

A. Yes, sir.

Q. That is a standard from, used by every line in the system, isn't it?

A. Yes, sir.

Q. Now, where does the requisition go?

Q. If the NO and NE requisition postage stamps we have one stock of postage stamps, kept by the Southern Railway Company, in the Washington office, if an agent or Division Officer, or any officer of the NO and NE makes a requisition for postage stamps, they are shipped to him from the Washington office and the cost of them is billed by the Southern Railway Company to the NO and NE.

Q. The Southern Railway Company advances the stamps and then collects it back in one stamp account?

A. Yes, one stamp account, one clerk handles the whole thing. Instead of having seven stamp accounts and seven clerks.

Q. Of course, it is to the benefit of all of you, the whole system to have one stamp account instead of seven.

Q. Yes.

Q. I will show you another form. Which is form 13. I wonder if you would identify that please, sir. I believe it is a form for some kind of employment.

A. This is what you might call an inter-office communication, inter-office memorandum. It doesn't need to have any heading on it. It needs to have the person who is making application for a job, the person they are making it to and their record, and the kind of jobs they have held. As a matter of fact, you probably have a form like this in your office, you probably buy them in the stationery store.

Q. It has got a heading on it, hasn't it?

A. Yes, sir.

Q. What is that heading?

A. Southern Railway System.

Q. We have a similar form here, what is that?

A. This is a form used by an employee in the office, this instance by the Superintendent. It would be addressed to a Company Surgeon asking him to examine a man.

Q. Is that used by all the affiliated lines?

A. Yes, sir. When the man is examined the Doctor will make a bill against his employer. If this

was signed by Supt. Wilson of the New Orleans and Northeastern Railway Company, the Doctor would make a bill against the NO and NE.

Q. That is a system form?

A. That is.

Q. Now we have previously asked you about this document here, which you said was put out for advertising by the System Traffic Department, which is a matter that goes out to the public.

A. That is right.

Q. Now, I want to direct a question to you about another that goes out to the public, which is indicated as a uniform straight bill of lading covering the particular system. Now, when a bill of lading is issued, where does that bill of lading go?

A. A bill of lading is usually prepared by the shipper and it is a contract of a carrier of freight. You only have here the face of the bill of lading, if you had the back of it, you would have the transportation contract. That is prescribed by Interstate Commerce law. Not the Southern Railway System law, and that is a matter of law. That is a contract of carriage.

Q. Who puts out that bill of lading, the shipper puts it out, but in this particular case, who puts puts that out?

A. We got that from the New Orleans and Northeastern Railroad Company in New Orleans.

Q. That is right. It says New Orleans and Northeastern and referred to as Plaintiff's Exhibit A, throughout And it shows the routing on this particular car, does it not?

A. Yes.

Q. And it shows the route as Southern—Selma. Did it say anything about the AGS?

A. No, sir.

Q. Did it say anything about the NO & NE?

A. No, sir.

Q. It just says Southern, doesn't it?

A. Yes, sir.

Q. That is another document you put out to the public?

A. Yes, sir. But we don't put that routing on there. The shipper did that.

Q. Have you got personal knowledge of who put that routing on there?

A. No, sir.

Q. That is just your opinion, is it not?

A. Yes.

Q. You have no personal knowledge of it at all?

A. No, sir.

Q. I show you a pass here, of the Southern Railway System. It has on the face of it. E. A. Evers, and this is marked as one of a group of exhibits previously submitted. That is a pass on the Southern Railway System, is it not?

A. No, sir.

Q. Read what it says across the top there?

A. It says Southern Railway System. That means nothing. The back has got a list of the railroads the pass is good on.

Q. That is correct, sir. It lists the affiliated lines there.

A. The pass is a pass on these railroads shown on the back of the form, not a pass on the Southern Railway System, because there is no such thing. He would have no place to ride. Southern Railway System operates no trains.

Q. The Southern Railway System, there is no such thing as that?

A. As far as transportation is concerned.

Q. I see. It does have a traffic Department as you referred to a bit earlier.

A. No, I said these traffic men were in an organization.

The Court:

Q. A pass then on the Southern Railway System then would not be honored on any of these affiliated lines, would it?

A. Your Honor, on the face of the pass it says Southern Railway System, then on the back of the pass it lists where it is good.

Q. Suppose there was nothing on the back of it.

A. There would be no place for him to ride.

Q. It would not be good on any of these affiliated lines?

A. I wouldn't think so.

Mr. Godbold:

A. Mr. Luckett, to get back to my last question: As I understood your testimony to be earlier, that this document merchandise part of the record, and on which I questioned you to some length, was gotten out by the Southern Railway System Traffic Department.

A. The Traffic is distributed by the Southern Railway System Traffic organization.

Q. I see. Getting back to the pass, Mr. Luckett, by whom was this signed? Can you identify it.

A. This is a fac-simile signature, and Mr. D. W. Brosline, the Vice-President of the Operating Department of Southern Railway Company and each of its affiliates. It is validated by D. B. Feagin, Manager of the Pass Bureau.

Q. That Pass Bureau serves whom, Mr. Luckett?

A. All of the Southern Railway System or Southern Railway Company and all of its affiliated companies.

Q. It is signed by Mr. Brosline and just says Vice-President. Does it say what he is Vice-President of?

A. No, sir.

Q. It just says Vice-President?

A. I would think most anybody would understand that it is the Vice-President of the railroad that operates the trains.

Q. Mr. Luckett, all of the affiliated lines in the Southern Railway System operate under a common rule book, do they not?

A. That is right.

Q. Suppose there were going to be an adoption of a new rule in this rule book, how would that be adopted? What proceedings would be going though?

A. I should think that the officer who recommended the new rule, he might be a superintendent, he might be a division engineer, he would recommend the new rules to his superior officer, finally it would get up to the operating Vice-President.

Q. The operating Vice-President who is the man who is the common Vice-President for all the lines? He would see about adopting the rule?

A. Yes.

Q. And that rule would affect every one in the system and the system would rule on it?

A. That is right.

Q. That would be just as true for inspecting a car as any other rule?

A. That is right. Some of the interchange rules in respect to inspection of cars are matters of law.

Q. I am assuming you are not dealing with a matter of law.

A. If you were dealing with a company it would be a matter of law.

Q. If the NO and NE, so far the NO and NE hasn't been making any money in the last few years, as I understand it?

A. It has been making money but it has not been paying dividends.

Q. If and when the dividends are paid, who gets that money?

A. The stockholders of NO and NE and the Southern Railway Company.

Q. Yes, sir. The Southern Railway Company.

A. It would be a matter of managerial discretion whether a dividend was paid or not.

Q. Mr. Luckett, does the Southern Railway System have a bank account anywhere?

A. It does not.

Q. It does not?

A. It has no official, it has no bank account, no vouchers, and no books.

Q. There is no official as such of the system?

A. No, sir.

Q. Now this is a system document, I am referring to the merchandise car directory, it doesn't say anything in here about the Southern Railway Company. Here is A. R. Cone, here, assistant to Vice-President, Southern Railway System, Chattanooga, Tennessee. Is he a Vice-President of the Southern Railway System?

A. He is the Assistant Vice-President separately of each of the railroads, including the operating group of the Southern Railway System.

Q. Is that what it says there, or does it say Assistant to the Vice-President of the Southern Railway System?

A. It says Assistant to Vice-President of the Southern Railway System.

That is all.

Mr. Rushton:

Q. I ask you to turn to page 4 on that document. That is the one you examined at so much length before and just recently. Is there a map there?

A. Yes, sir.

Q. Does that map say Southern Railway System?

A. It does.

Q. And does it show the component parts of that system?

A. Yes, sir, it does, Southern Railway Company. Cincinnati, New Orleans, and Texas Pacific Railway, Alabama Great Southern, New Orleans and North Eastern Railroad Company, Georgia Southern and Florida Railway Company.

Q. Does it also have a map which is a reproduction of this same map, and on that map where is the line out of New Orleans designated and in whose name?

A. It is designated New Orleans and Northeastern Railroad Company.

Q. Then this map does show what the whole system is composed of?

A. It doesn't show all of the companies there.

Q. It just shows NO and NE?

A. Yes, sir. It shows also that the routing information is included in that pamphlet.

That is all.

Mr. Godbold:

Q. Just one other question. Lets go back to the car pool, Mr. Luckett. Where the cars of a system are put into a common pool. Suppose one of those cars are used by the Erie Railroad Company, and the Erie Railway Company is going to pay for the use thereof, to whom does it issue its check?

A. The Southern Railway Company.

Q. It forwards the money to Southern Railway Company?

A. Yes, sir.

Q. Then what does Southern Railway Company do with it?

A. The Erie Railroad would make a report to Southern Railway Company of all Southern Railway Company, AGS and NO and NE cars, on the Erie. Southern Railway Company in turn would make a report to Erie Railroad of all the cars on the Southern Railway System lines. Those reports have car days. The number of cars in it. The per diem rate is multiplied by the car days of each company, we balance that off, we get a net balance, and if it is in favor of Erie, then Erie draws on Southern Railway Company. Southern Railway Company prorates that to the other companies on the basis of the car days that the cars go on each of the lines.

Q. Initially if the Southern Railway System pool owes money, it is drawn out of the Southern Railway Company funds. If Erie owes the Southern System pool money, it repays it to the Southern Company, do they not, and then the company divides that.

A. It is a clearing house arrangement.

Q. So at least until the accounting day comes and the funds are prorated, there is a pooling of the funds, isn't there?

A. I would not call it a pooling of the funds.

Q. Well, the funds are held by the Southern Railway Company, are they not?

A. It may so happen that the Southern Railway Company has advanced the money.

Q. All right. It has advanced it, if it has received it, it has it and is holding it until it is disbursed.

A. They prorate it.

That is all.

The Court:

Gentlemen, if Dr. Kaiser is here, lets get through with this testimony.

(Dr. Kaiser was examined by Mr. Godbold, who then rested his case.)

MR. HARRIS ETHERIDGE, called as a witness for the defendant, being duly sworn, testified as follows:

Direct Examination.

By Mr. Hinson:

Q. State your name?

A. Harris Etheridge.

Q. Mr. Etheridge, are you employed by the Tank-Kar Oil Company?

A. Yes, sir/

Q. Were you employed by them in May, 1952?

A. Yes, sir.

Q. Do you recall receiving a tank car of gasoline No. SHPX 21336?

A. Yes, sir.

Q. Do you have a record of that?

A. Yes, sir.

Q. You were billed for the transportation of that car, were you not?

A. Yes, sir.

Q. By what railroad was it billed?

A. The Western Railroad.

Q. The Western Railway of Alabama?

A. Yes, sir.

Q. Whom did you pay for the transportation of that car?

A. The Western Railway of Alabama.

Q. Did you pay to the Coast Line Railway Company any part of the charges on that car?

A. No, sir.

Q. That is all.

Cross Examination.

By Mr. Godbold:

Q. May I see the papers that pertain to this matter, which you have in your possession. Clipped to these other papers, Mr. Etheridge, is a document called: "Instructions for the movement of empty tank cars." Where did you get this document?

A. That was sent to the Tank Oil Company with the invoice, by the shipper.

Q. Who was the shipper?

A. A Petroleum Corporation.

Q. This is a form that so far as you know the petroleum company filled out?

A. Yes, sir.

Mr. Hinson:
We would like to offer this in evidence.

(Received and marked Defendant's Exhibit No. B)

The Court:
Speak out gentlemen.

Mr. Stewart:
He is offering in evidence Your Honor, an invoice prepared by the shipper to show this same routing of the car to Southern to Selma, that is on the bill of lading which has been shown to be prepared by—

Mr. Godbold:
I don't think that has been shown.

Mr. Stewart:
We object to it in so far as the document having any binding effect on this defendant.

The Court:
Overrule the objection.

Mr. Godbold:
Q. That shipper, the Bay Petrol Company, is located where, Mr. Etheridge?
A. At Chalmette, Louisiana.
Q. You have here the original bill of lading, also, I believe?
A. Yes, sir.
Q. Is this the bill of lading?
A. Yes, sir.
Q. How did you get that bill of lading, how did that come to you?

A. That was attached to the invoice.

Q. And that has New Orleans and Northeastern across the top?

A. Yes, sir.

Mr. Stewart:

Q. This invoice to which you referred, this invoice was prepared by the Bay Petrol Company, and is prepared by the shipper, as far as you know?

A. Yes, sir.

Q. No one of the railroads prepared this invoice?

A. No, sir.

Q. It was not prepared by the New Orleans and Northeastern, nor the Southern Railway Company, either, as far as you know?

A. No, sir.

Q. Is the same true of the shipping instructions which you got, attached to the invoice, to which you have just testified to?

A. It is prepared by the shipper.

Q. You say this bill of lading was attached to that invoice?

A. Yes, sir.

Q. Mr. Etheridge, isn't it an unusual procedure for the shippers to type out the bills of lading themselves?

Mr. Godbold:

We object to that unless it is shown that he had particular knowledge of the preparation of this particular bill of lading. It has New Orleans and Northeastern on the face of it. As to what the custom is, that is not admissible, because the only question here is who did prepare this bill of lading, or who

accepted it, and his knowledge of the usual custom of shippers, is not admissible on that issue.

The Court:

Overrule the objection. If he knows I will let him answer that question.

A. I don't know. The ones we received were in that order.

Q. You don't have any experience in making them?

A. No, sir.

That is all.

MR. J. P. BRANNAN, being called by the defendant, first being duly sworn, testified as follows:

Direct Examination.

By Mr. Hinson:

Q. Is this Mr. J. P. Brannan?

A. Yes, sir.

Q. Mr. Brannan, what is your position with the Western Railway of Alabama?

A. I am freight agent.

Q. Were you freight agent in May of 1952 with the Western?

A. That is right.

Q. Mr. Brannan, do your records show that the Western of Alabama handled tank car from New Orleans and North Eastern from Selma, Alabama to Montgomery, on May, 1952, of Tank-Kar No. SHPX 21336?

A. Yes, sir. Our records do show we did handle it.

Q. You did handle it from Selma to Montgomery?

A. Yes, sir.

Q. Mr. Brannan, when that car got here to Montgomery, who notified the consignee that the car was here?

A. We sent them an arrival notice that the car was here.

Q. Do you know whether the Atlantic Coast Line Company generally notifies them when you turned it over to them for switching orders?

A. No; the customary procedure is that when a man has a private siding the placement of that car constitues notice. In delivering the car to Montgomery we send them an arrival notice for which he sends us a check, for the freight charges.

Q. Who was the freight charges paid to in this case. Was the freight all the way from New Orleans to Montgomery, to the place where that car was placed.

A. It was paid to the Western Railway by the Tank-Kar Oil Company.

Q. Were any part of those freight charges paid over to the Atlantic Coast Line?

A. I would not say that the freight charges were paid over to them.

Q. The Western Railway of Alabama did pay the Coast Line a switching charge?

A. Yes, we paid them a switching charge.

Q. That was for switching that car from the Day Street yard to the siding where it was going to be unloaded?

A. Yes, sir.

Q. Then the Coast Line got no part of the freight charges on this car?

A. No, it got a switching charge.

Q. Do you know the amount of that switching charge?

A. $4.53.

Q. So $4.53 is all the Coast Line got out of that?

A. Yes, sir.

Cross Examination.

By Mr. Godbold:

Q. Mr. Brannan, you said something about a private siding. This fellow was not on a private siding here, was he?

A. The way I understand it, it was a place for the Tank-Kar Oil Company's siding.

Q. That was not the ACL's private siding?

A. I could not answer that. It was ACL's service track. Whether it was Coast Line track, I don't know.

Q. It belongs to the tank car Oil Company—

A. In other words, it was designated place of delivery.

Mr. Stewart:

Q. Mr. Brannan, when a railroad contacts a carrier of freight, isn't it a fact, Mr. Brannan, that the shipper makes up the bill of lading and then take them with the freight itself to the railroad for signing by it.

A. In a case of a solid car, of course, that would not be the case. The car would be on the siding and they would bring it on in to the freight office.

Q. And on a shipment of freight the shipper would make that up in his own office and bring that to the railroad?

A. Yes, sir. That is the usual proceeding, sometimes we have done that.

Q. Will you tell us what a way-bill is.

A. A way bill is nothing more or less than a transcription of a bill of lading for which the railroad handles the car from the point of origin to its destination.

Q. Are way bills prepared by the railroad?

A. Yes, sir.

That is all.

J. W. MACEY, being called as a witness by the defendant, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Hinson:

Q. Is this Mr. J. W. Macey?

A. Yes, sir.

Q. Mr. Macey, what is your position with the Atlantic Coast Line?

A. Freight agent.

Q. Were you freight agent for the Coast Line in May, 1952?

A. I was.

Q. Do your records disclose and do you recall a car SHPX 21336, which the Coast Line handled here in Montgomery which was on a switching charge on about May 4, 1952?

A. I do.

Q. Mr. Macey, where did the Coast Line handle that car from?

A. From the point of interchange, with the Western Railway of Alabama.

Q. On what kind of haul was that?

A. A switching haul.

Q. Did the Coast Line Railroad Company receive any of the revenue for the transportation of that car paid by the consignee?

A. It did not.

Q. What did the Coast Line receive for compensation for switching that car?

A. $4.53.

Q. Who paid that?

A. The Western Railway of Alabama paid it, to the Coast Line.

Q. Did the Coast Line notify the consigneee anything about the car?

A. We did not.

The Court:

Q. Who did this side track that this car was placed on belong to?

A. It was the Atlantic Coast Line track.

Q. It was the property of the Atlantic Coast Line?

A. The track itself, yes.

Mr. Hinson:

Q. Mr. Macey, the Tank-Kar Oil Company had a pipe line right up to the siding there, did it not?

A. Yes, sir.

Q. And that is where the car, if they had any business with the Coast Line the car they received would be unloaded?

A. That is correct.

Q. Did the Coast Line and other railroads use this car on its line, would they sometimes pay what is known as per diem?

A. There is no per diem on private owned tanks, or any other privately owned car.

Q. The Coast Line paid no per diem.

A. It did not.

Q. This was a privately owned car?

A. That is true.

Q. Who owned it?

A. The National Car Lines, New York City, I believe owned it.

That is all.

Mr. Godbold:

No questions.

C. B. SHIRLEY, being called as a witness by the defendant, being duly sworn, testified as follows:

Direct Examination.

By Mr. Hinson:

Q. Is this Mr. C. B. Shirley?

A. Yes, sir.

Q. You live here in Montgomery?

A. Yes, sir.

Q. Mr. Shirley, in May of 1952 what was your occupation?

A. In 1952 I was with the Atlantic Coast Line as car inspector.

Q. Are you retired now?

A. Yes, sir.

Q. Do you recall around May 4, 1952, inspecting a cut of cars that came from Western of Alabama, out here in the Day Street yard?

A. Yes, sir.

Q. Now in your inspection, when you inspect a cut of cars, if you find anything wrong with that car you bad order that car and make a note of it, do you not?

A. Yes, sir.

Q. Do you recall making an inspection of a cut of cars wherein car SHPX 21336 was among those cars?

A. Yes, sir. It was in that cut.

Q. What kind of inspection did you make of those cars, and did you customarily make and did you always make as long as you have been working for the railroad?

A. The ordinary inspection as usual.

Q. What kind of inspection was that, tell what you did that day.

A. Well, this particular car, I gave it the usual inspection the same as any other car in the cut, of the twenty-five cars. Out of the cut of twenty-five I had ordered three cars. And this SHPX I found no objection to it.

The Court:

As far as this law suit is concerned, just to say you gave it the usual inspection don't get us anywhere. What did you do in the course of your inspection?

Mr. Hinson:

Q. Describe what you did.

A. All right, sir. A cut of cars was pulled in track No. 22, and I started at end in the middle of

the yard, I went down one side and back on the other side on the ground. I never crawled up on cars, or a tank car yet, unless I could discover something wrong with it.

Q. You just looked up there?

A. Yes, sir.

Q. Did you look up on all these including the SHPX?

A. Yes, sir, I gave it a ground inspection. There is a short foot board up there and it was all right, it was about eight foot up there. I did not get up on top of it. We never do get up on top of a tank car. The lower running board extended from end to end of the car and gave it a final inspection a ground inspection the same as the top inspection.

Q. Was there anything visible in that running board of that tank car that led you to believe it was defective?

A. No, sir.

Mr. Godbold:

We object to that unless it is predicated from his position on the ground.

Q. Well, from your position there on the ground where you were standing?

A. It was a newly painted car. The foot board up there was newly painted. And it looked like a new board.

Q. Now how long have you been inspecting cars?

A. Well, I have been with the Coast Line for 37 years, I have been inspecting I would say for 15 years, in the yards.

Q. Are you familiar with the usual inspection given by the railroad when received by the deliver-

ing carrier in the railroad business the type of inspection usually given?

A. Yes, sir.

Q. Was the type of inspection you gave this car there, the usual inspection given by railroad car inspector in the railroad business, operating a first class railroad today?

A. Yes, sir.

Q. Is it customary in the railroad business today, operating a first class railroad, for a car inspector of a delivering carrier, or an intermediate carrier, to get up and hit or tap the dome steps of a car and other parts of a car which to the naked eye up there appears to be in good order?

Mr. Godbold:

I object to that. The question before the jury is not what is customarily done, or what the railroads usually do, but the question is whether they did, on this particular occasion give the inspection which the laws requires, which is a reasonable and proper inspection of the unloading devices. And the question as to whether it was a reasonable and proper inspection of the unloading device is for the jury, and not for the Coast Line witnesses to pass on by saying what they usually do.

Mr. Hinson:

Your Honor, I asked him after I had first qualified him as to his experience, I asked him if the type of inspection given was the type of inspection that railroad operating inspectors customarily give on examining a car, a delivering carrier or an intermediate carrier, and I think it would be admissible on those grounds.

The Court:

I think the question for the jury to decide under the testimony is whether there was a reasonable inspection made. It might be admissible to show that it was the customary inspection. I overrule the objection.

Mr. Hinson:

Q. I believe you answered my question when I asked you if in the general operation of railroads, a class A, railroad operates today, the car inspector for a delivering carrier, or an intermediate carrier, is the type of inspection you gave there the type of inspection usually used by first class railroads operating today.

The Court:

I think that is the very same question we have been over today.

Mr. Hinson:

Mr. Godbold objected to it, Judge and you said you would let him answer. That is all I wanted to ask him.

Cross Examination.

By Mr. Godbold:

Q. Mr. Shirley, how many cars were in this particular cut that you inspected on this occasion?

A. Twenty-five.

Q. And you tell us that you recall specifically

SHPX 21336?

A. No.

Q. You don't recall that car specifically?

A. No.

Q. You just know you inspected a cut of cars which contained this car?

A. It was the usual inspection.

Q. All right, sir. How many cars were in that cut, Mr. Shirley?

A. Twenty-five.

Q. What time did you start inspecting that car approximately?

A. Well, it arrived in our yard at 5:30 and I started right after that.

Q. What time did you finish inspecting that car?

A. Six P.M.

Q. So in all it took you about thirty-five minutes to inspect how many cars?

A. Twenty-five.

Q. That is about a minute for a car. You walked down one side of the train and you walked back up the other.

A. Yes, sir.

Q. That is what your inspection consisted of?

A. That is right.

Q. Mr. Shirley, I will show you here a document entitled, "United States Safety Appliance." This is a little book, you are familiar with that little book, are you not?

A. Yes, sir.

Q. You use it in your business?

A. Yes, sir. It is furnished to us when we are put out on the yard.

Q. Beginning on page 108 and going through page 115, there are listed various safety appliance, says classification of safety appliance defects. And that is a list of safety appliance items which are supposed to be checked on the cars of a train, or of

a cut of cars, and this tells you how to put on a bad order tag, and to note one of these defects, isn't that right?

A. That is right.

Q. Did you have to inspect the locomotive on here or just the cars?

A. The cars. The locomotive had been cut off and I had flagged both ends.

Q. Now, in this list of safety appliance defects, which is supposed to be checked on all cars, that are applicable, there are some 300 items, are there not?

A. Yes, sir.

Q. Now some of that 300 applied to the locomotive, did it not?

A. The locomotive went to the round-house, it did not come under me.

Q. But what I am driving at is some of this list of 300 safety applicance Act checked are locomotive acts are they not?

A. Some of them, yes.

Q. But the most of them are for the cars, are they not?

A. They are.

Q. As I understand it, you checked 35 cars in 35 minutes, checking all of those 25 cars or each of them for most of the 300 items?

A. Yes, that is right.

Q. You did that in a minute and a third per car.

A. Well 25 cars in 35 minutes.

Q. Were there any box cars on that cut?

A. Yes, sir.

Q. As I understand your testimony you never got off the ground?

A. Yes, sir. I got on top the house cars.

Q. You did get off the ground, you walked along the top of the box cars.

A. Yes, sir. Along the sides when I would get to a house car I would inspect the running boards across the top.

Q. Did you get up and walk the running board across the top?

A. Yes, sir.

Q. So your trip did include walking down one side and back up the other and also included getting up and walking along on the tops of any box cars?

A. Yes, sir.

Q. How many box cars were there, would you say?

A. I would be afraid to say, there were four or five tank cars. The rest were flat cars and box cars.

Q. Now a box car has got a running board that goes across the top, hasn't it.

A. Yes, sir.

Q. And that board is put there for people to walk on, is it not?

A. For the transportation department to operate while the trains operate.

Q. They walk along the top. It is used to walk along and to stand on.

A. Yes, sir.

Q. You walked on box cars and you checked it from above, didn't you?

A. Yes, sir.

Q. This board here involved, Mr. Shirley, I will show you a photograph which without dispute is a photograph of the car in question, SHPX 21336, with a broken board dangling there at the top?

A. Yes, sir.

Q. Now people stand and walk on that board, do they not?

A. No, sir, not in transportation.

Q. That was not my question. People stand and walk on that board, too, do they not?

A. Well, they have a right to get up there to unload the car.

Q. Can that car be unloaded without a man getting up there and standing on that board?

A. No, sir. You have got to get up there and undo that dome cap, and release the valve, and then go underneath and release some more valves.

Q. And that is common knowledge in the railroad business that a tank car can't be unloaded without a man getting up there and standing on that board?

A. Well, he could stand on the tank car.

Q. Well, he has got to get up there in the vicinity.

A. He could go up the ladder and get on the tank car.

Q. He has got to get up there to get that dome undone?

A. Yes, sir.

Q. And that is what that is for isn't it. He may not stand on it, but it is put there for him to stand on, if he feels a need to do so, isn't it?

A. Yes, sir.

Q. It is not there for a decoration?

A. Well, he could get up on the tank car and hold to the dome.

Q. That board is put there for use in handling that dome, isn't it?

A. Yes, sir. It is not put there to walk and run on.

Q. It is put there to stand on, isn't it?

A. I suppose so.

Q. It is not put there for decoration, is it?

A. No, it is put there for a purpose.

Q. And the purpose is to use it in loading and unloading that car, is it not?

A. I think so.

Q. Lets get back to one other question. It is common knowledge in the railroad business that in order to unload the car a man has got to get up there around the dome, hasn't he?

A. I would think so.

Q. And the Atlantic Coast Line has answered under oath in this case, that it did not even know that people had to get up there to the dome to unload a tank car, it is mistaken isn't it?

A. He has got to get up on a tank car. There are some of these tank cars that haven't got this board, this foot board.

Q. It has got some kind of step on it.

A. He can go down on the tank and get that cap off.

Mr. Godbold:

We call the Court's and jury's attention to the fact that the Coast Line has sworn under oath, and been examined under interrogatories that he didn't know that anybody had to get up there to unload a tank car.

Q. Mr. Shirley, you tell us that in making this usual and ordinary inspection of a tank car, that it is not usually customary to get up there and look at the top of this top board up there?

A. No, I give that a ground inspection. It is about seven or eight feet from the ground, and if it looks okay from underneath, I don't get up there.

If I see something that looks like a defect then I do get up there.

Q. Assuming that it looks all right from the ground, lets assume first that you have got a board that is broken 9/10 through, from the top. And you can't see that from the bottom. You don't check, or observe, or pass on that board in the process of your inspection, do you?

A. If it looks all right from underneath I pass on it.

Q. And if it is defective on top, you don't check that?

A. Not unless I see a big knot in it. This board had been newly painted and the knot did not show. A defect did not show.

Q. It did not show from the bottom. How many knots did it have in it?

A. I never did see the board.

Q. I will show you a picture here, marked Plaintiff's Exhibit No. 2, Mr. Shirley, which without question shows the board. Those cracks that go along, where it broke, one right where it broke and various other cracks here, are plainly visible is it not?

A. Yes, sir.

Q. When you look at the board from the top?

A. Yes, there is a knot hole or something visible there.

Q. You don't have any trouble seeing that in spite of the new coat of paint, do you?

A. If you are looking at the top, no, that can be filled up with paint. If that board had paint on it you couldn't discover it at all.

Q. This has been newly painted, has it not?

A. Yes, It has not been long.

Q. And you can plainly see those, can't you?

A. Yes.

Q. So the new paint didn't fill them up, did it?

A. No.

Q. Just one other question, Mr. Shirley. You tell us you are retired from the Atlantic Coast Line?

A. Yes, sir.

Q. As a matter of fact, isn't it true, Mr. Shirley, that you were let off and are not trying to get the job back?

A. No, sir. I would not go back.

Mr. Hinson:

Q. Mr. Shirley, you are getting paid and are not working, are you?

A. Yes, sir. I am doing better than when I worked.

Q. The picture Mr. Godbold showed you was made after the board had been broken apart, had it not?

A. Yes, sir.

Mr. Stewart:

Q. Mr. Shirley you have been railroading for thirty-seven years, have you not?

A. Yes, sir, about fifteen years, a car inspector.

Q. And you have been a car inspector for approximately fifteen years, based on your experience and knowledge as a car inspector, do you have an opinion as to what constitutes a careful and ordinary inspection of a tank car?

A. Yes, sir.

Q. And Mr. Shirley, is the visual inspection of a tank car from the ground a careful and ordinary inspection of a tank car?

Mr. Godbold:

Judge we object to that. That is the very question for the jury here.

The Court:

They have a right to hear all the testimony in determining that question. Overrule the objection.

Mr. Godbold:

We except.

Mr. Stewart:

Q. The question was whether or not, based on your opinion and your knowledge, and experience, whether or not a visual inspection from the ground constitutes an ordinary and careful inspection of a tank car?

A. Yes, sir.

I think that is all.

MR. J. T. COLE, called as a witness by the defendant, being duly sworn, testified as follows:

Direct Examination.

By Mr. Hinson:

Q. Is this Mr. J. T. Cole?

A Yes, sir.

Q. What is your occupation, Mr. Cole?

A. Car inspector.

Q What railroad?

A. Western of Alabama.

Q. Were you a car inspector for the Western of Alabama in May of 1952?

A. Yes, sir. I was.

Q. On or about May 4, 1952, did you inspect a cut of cars containing the car No. SHPX 21336 which was turned over to the Coast Line?

A. I couldn't answer that question because I don't know.

Q. You didn't examine that car?

A. I could not say whether I did or not.

Q. Did you examine a cut of cars that were turned over to the Coast Line on May 4th, 1952?

A. I could not recall whether that was my off day or not. I couldn't say whether I was working that day or not.

Q. You do inspect cars for the Western of Alabama, still?

A. Yes, sir.

Q. And you do inspect cars for the Central of Georgia?

A. Yes, sir.

Q. How long have you been inspecting cars?

A. A little over thirty-one years.

Q. When cars come in here to Montgomery, say from Selma, Alabama to Montgomery, Alabama, on the Western, they are inspected by the Western are they not? And then they are transferred to the Coast Line on a switching charge?

A. They are, if they have time to inspect them. Sometimes they are switched before they have time to inspect them.

Q. Will you state what sort of inspection is given these cars, when they are inspected?

A. We give them a routine inspection. We look them over for any kind of a defect that would be

on the car. We go along the train and look for all the defects we can find.

Q. Is that inspection made from the ground, looking up at the car?

A. Yes, sir.

Q. This is Mr. J. T. Cole, isn't it?

A. Yes, sir.

Q. I want to refresh your recollection. Is that your signature there?

A. Yes, sir.

Q. To refresh your recollection I will ask you to read that over.

A. Yes, sir. In regard to car No. SHPX 21336, 5/3/52, "I have checked my records and have not found any record of any exceptions being made to this car."

Q. Now, if you checked that car—

Mr. Godbold:

We object, Mr. Hinson. His testimony is he does not know whether he checked that car or not.

Mr. Hinson:

Were you working on May 3, 1952?

A. I was working, according to that.

Q. And you inspected the cars that came in here on the Western from Selma, did you not?

A. I couldn't say about that. If you notice, I said, "I hold no exceptions. I have checked my records you see when they come back. You see, I file a record of all exceptions made to a car while it is in our hands, and then he comes back to me with a letter like that, stating what he wants to know. I said, "I have checked my records and if

I have any exceptions that is the way I answer it. If I had exceptions I would have given him the exceptions.

Q. You mean by exception if you find something wrong you make an exception to it?

A. Yes, sir.

Q. If you don't find anything wrong, don't make any exceptions?

A. No, sir.

Q. And you have no record of any exceptions made to the car that day.

A. No, sir.

Q. You are a car inspector for the Western, aren't you?

A. Yes, sir.

Q. How long have you been a car inspector?

A. I have been an inspector all along, off and on. Of course, I have moved from different jobs. I was Write-up Man in the Shops for several years.

Q. How long have you been inspecting cars?

A. I have been with the railroad for thirty-one the exact number of years. I could go back and check my record.

Q. Do you know what is the customary safe inspection of cars, what that consists of for railroads for interchange and when they are turned over for delivering carriers, or carriers for the switch? years. I was inspecting off and on. I could not say

Mr. Godbold:

We object to that He started off with what was the customary inspection and now he is asking what is a safe inspection. That is a question for the jury.

The Court:

He says in time he has inspected some cars, but he has not connected it up. I told you you could ask him what was the customary inspection of a tank car. If he knows.

Mr. Hinson:

Q. Do you know what the customary inspection was for a tank car for a first class railroad operating in the United States?

A. Well, we give them all our routine inspection around the train, when they come in, when we have time. Sometimes they are switched up and we don't get around them because we have too much work to do.

Q. Now, when you give that inspection to them, is that a ground inspection on a tank car?

A. Yes, sir, ground inspection.

Q. Is it customary to get up on the tank car, on the dome step board there and test it out, if your ground inspection doesn't disclose anything wrong with it?

A. Well, if we see anything that looks suspicious that something might be wrong up there then we go up and see about it.

Q. If your ground inspection doesn't disclose anything do you get up there?

A. No, sir.

That is all.

Cross Examination.

By Mr. Copeland:

Q. Mr. Cole, you say you don't get up there and beat on it with a hammer unless you see something

wrong with it. How about taking a look at this. Now you are taking your chances, if you don't get up there and look at it, aren't you?

The Court:

That is argumentative, Mr. Copeland.

Mr. Copeland:

Q. Have you ever got up and checked one of these boards?

A. Sure.

Q. Do you customarily do that?

A. If I see something that I think is wrong with it or something, I get up and check it then and see. The Board might be decayed or it might look like it was loose or something.

Q. Mr. Cole, you state that usually these inspections are made from the ground?

A. Yes, sir.

Q. That you worked around the train on the ground, but you do go up on top of some cars, do you not?

A. Yes, we do on box cars.

Q. And some of the items that you have to inspect are above the level of your eye sight?

A. Yes, sir.

Q. In this little book "United States Safety Appliances," They have a list on Page 108. "Classification of Safety Appliance Defects." Just look through that please, sir. Some of these things are above the level of your eyes and the only way you can check it is to go up there?

A. Oh, yes, there are a number of them that are up above the level of your eyes, where you would be looking for some cracks or something If they

are narrow, not too wide apart unless you were pretty close to it. If it was where you could get away from it, why you could see it. There is a variation in the yards and so on.

Q. Mr. Cole, suppose you were going to inspect a car that was gging to be turned over to another road, after, I believe you call that interchange. Is the inspection that you give a car that you are going to turn over to another road in interchange, is that any different from an inspection you would give a car when you know it is going to be turned over to the consignee for unloading?

Mr. Stewart:

Is that question directed to a tank car. You just say a car. We would like for the record to show it was a tank car.

Mr. Copeland:

All right.

Q. Is there any difference in the type of inspection given a tank car that is being transferred to another road on interchange and an inspection given to a tank car when the tank car is going to be placed by the railroad inspecting the car in the hands of a consignee for unloading?

A. No, sir. There is no difference whatever.

Q. Would you look at that break right here along the top and tell me whether that is a safety appliance on that car?

Mr. Hinson:

We object to that question.

The Court:
Sustain the objection to that.

Mr. Godbold:
We except.

That is all.

J. T. GRIFFIN, being called as a witness, being duly sworn, testified as follows:

Direct Examination.

By Mr. Hinson:

Q. Are you Mr. J. T. Griffin?

A. Yes, sir.

Q. What is your occupation, Mr. Griffin?

A. I am car foreman for the Atlantic Coast Line.

Q. Were you car foreman for the Coast Line in 1952? In May, 1952?

A. Yes, sir.

Q. Do you recall examining a broken running board, or pieces of a broken running board, of a car, No. SHPX 21336, about May 5 or 6, of 1952?

A. Yes, sir.

Q. Where did you examine that running board or those pieces?

A. I examined a running board over near the Atlantic Coast Line freight office immediately behind it, on what is known as the ten track.

Q. Is that where a tank car is delivered to the Tank Kar Oil Company to be unloaded?

A. Yes, sir.

Q. Will you describe the running board that had already been broken at that time?

A. It was not the running board but the dome step:

Q. Will you describe that dome step to the jury?

A. I will as near as I can. The dome step board is fastened up near the top of the side of the tank, on two metal brackets, and the dome step board can be of a size from 2 inches thick to about 7 to 10 inches wide. Of course, the length can be any length. There is no specified requirement as to that.

Q. What I want you to do is describe the condition of that board, the break and everything.

A. All right, sir. The board was broken near one bracket. Just inside the bracket. The board was almost newly painted. In fact it had not been too long since it was painted, completely. So at the break it fell through a knot, and around this knot was anterior dry rot.

Q. Mr. Griffin, is that a picture of that tank car, and that board there.

A. Yes, sir.

That is all.

Cross Examination.

By Mr. Copeland:

Q. Mr. Griffin, what caused that board to break?

A. The knot in the board was what caused it to break.

Q. Was that knot painted over?

A. Yes, sir.

Q. You said something about the board being infected with interior dry rot?

A. It has interior dry rot around this knot.

Q. And had all that been painted over?

A. Yes, sir. The board has been completely painted over.

Q. You saw the component part of that board, did you?

A. Yes, sir.

Q. Before that board was broken there, was that invisible to the sight?

A. Yes, sir.

Mr. Godbold:

Judge, we are going to object to that. That is a pure conjecture of this witness.

The Court:

Did you examine the break and the condition of the timber and all and do you have a judgment as to whether the conditon would have been visible on a casual inspection?

A. No, sir. It would not have been visible on a casual inspection.

Mr. Copeland:

It would not have been visible to sight?

The Court:

Did I understand you to say that the timber itself showed some indications of dry rot?

A. Yes, sir, in sight, anterior.

That is all.

Direct Examination.

By Col. Rushton:

Q. Mr. Griffin, what sort of wood was that? Was it pine or oak or what?

A. It was pine.

Q. And it was about 2 inches thick, and roughly about six or eight feet long?

A. Yes, sir.

Cross Examination.

By Mr. Godbold:

Q. Mr. Griffin, you are still car foreman for the Atlantic Coast Line Railroad, are you?

A. Yes, sir.

Q. Now, you didn't see that board at all before it was broken, did you?

A. No, sir.

Q. But you tell us about your opinions about it based on your observations of the board, after it was broken?

A. Yes, sir.

Q. When you saw the board that day, Mr. Griffin, did you know that it had broken under a man and that he had fallen to the ground?

A. No, sir.

Q. When did you first learn that a man had fallen to the ground, standing on that board?

A. I don't remember right when I found that out. In fact I didn't know any one had been on it or if it had just been placed there. A man came out to the shop, a messenger boy, and gave me a number and asked me to go down and inspect this tank car.

Q. What was done with the board, Mr. Griffin?

A. The board, I took the board off, after it came in the shop for repair, and put a new board on there.

Q. What was done with the old one?

A. I kept the old board for a period around six to eight months.

Q. Do you still have it?

A. No, sir.

Q. What happened to it?

A. Well, in six or eight months there was no inquiry and I had it burned.

Q. Looking at these pictures, you have stated your opinion that the defect in the board was not visible before it broke, and that before it broke it had been painted over.

A. Yes, sir.

Q. Now, there is plainly visible over that naked board a series of cracks running over that board, is there not?

A. Yes, sir.

Q. Those cracks are there, and right before the board broke, and one of those cracks shows right through that board, does it not?

A. That is right, but the cracks do not impair the strength of the board.

Q. You tell us these cracks in the board had nothing to do with the breaking of it?

A. No, sir.

Q. Even though one of the cracks is located at the exact spot where the board broke?

A. No, sir.

I have no further questions.

The Court:

I want to ask the Auditor one or two questions.

Q. Mr. Luckett, the question I wanted to ask you, if you know, in all these railroads and their affiliates, lines, that would be under the classification of the railroad system, do they all have to make a periodical report to the Interstate Commerce Commission about their operations?

A. Yes, sir. Each one makes that out. The Interstate Commerce Commission divides the railroads into classes. Class 1, and Class 2, etc.

Q. I want to ask you who made those sets of reports, who made those and sent them in?

A. The monthly reports are signed by me, as General Auditor.

Q. Do you fix them up and make them?

A. That is made by the people under my supervision. These are annual reports, for the year 1952, for the North Eastern and the Southern. These reports are made in the office under my jurisdiction and they are sworn to by the Comptroller.

Q. They are not made in one report, they are separate reports?

A. Yes, sir. Each company makes a separate report. There is no such thing as a system report.

All right. That is what I wanted to clarify.

Col. Rushton:

May we introduce these reports in evidence?

The Court:

Yes, sir, you may introduce them in evidence.

The Court will now take a recess until fifteen minutes until 2:00 o'clock.

(After lunch, February 24, 1954.)

The Court:

Gentlemen of the Bar, there is one phase of this case; I don't know whether it will shorten the trial or not; but there is one phase of the case that I am ready to announce my ruling on.

I don't think there can be ar recovery in this suit under the complaint from the evidence against the Southern Railroad Company as the originating carrier, of New Orleans.

Now, the complaint does allege that they took possession and was the carrier of the defective car, but so far it looks to me like there is very meager evidence, if any, on which a finding might be predicated on that theory of it. I don't know whether the Plaintiff would want to amend his complaint with reference to that and undertake to make them responsible as intervening carriers or not. I don't think there can be any recovery as the originating carrier.

Mr. Godbold:

Your Honor, will you give us an opportunity to be heard on that point, particularly in view of some of the evidence which has been disclosed.

The Court:

I think I have been over the evidence pretty thoroughly and I think I am pretty familiar with it, and I have done a good deal of reading on this proposition.

Mr. Godbold:

We had some cases we wanted to refer to on that, if Your Honor will hear us.

The Court:

Well, I expect I have already looked at most of your cases. Do you have reference to the case in the Fourth Circuit decided by Judge Parker?

Mr. Godbold:

Yes, sir, with reference to that and—

The Court:

I think that is distinguishable from this situation. Now as to their being one and the same thing, my mind is clear on that, that there is no evidence here to sustain the proposition that you would treat one as the other: I think the expression of Southern Railway System has more of a legal significance under this testimony, and this situation here, than to refer to the railroad system of the United States or railroad system of Alabama.

Mr. Godbold:

Judge, we do have cases here, and some of the evidence which we know Your Honor has not had occasion to see in detail. Some reports just put in evidence before lunch, which do go to the question of whether even if they are not one and the same thing, there is a separate legal proposition, or whether the Southern Railway Company as the dominant carrier, and as owner of all the stock, is responsible for the tort of this subsidiary, whether or not it is the same thing.

The Court:

Did you say there is something in that report you want to call my attention to on that point?

Mr. Godbold:

Yes, sir. We do have one or two things and we would appreciate the opportunity.

The Court:

Let's get along with the testimony but that is my view of this now, that there can be no recovery as originating carrier. Call your next witness for the defendant.

(DR. JACKSON L. BOSTWICK was the next witness, his testimony is being omitted by agreement of counsel.)

* * * * * * * * *

MR. VAN WILLIAMS, called as next witness, being duly sworn, testified as follows:

Direct Examination.

By Mr. Hinson:

Q. Mr. Williams, in 1952, what was your occupation?

A. I was general foreman of the Atlantic Coast Line shops in Montgomery.

Q. Are you still with them?

A. Yes, sir.

Q. Where are you located now?

A. In Fitzgerald, Georgia.

Q. What is your occupation or position there?

A. I am a Master Mechanic.

Q. Mr. Williams, on or about May 5 or 6, 1952, did you examine a dome step board on a tank car No. SHPX 21336?

A. I did, sir.

Q. Where did you examine that dome step board?

A. I examined the dome step board at the A.C.L. shops.

Q. That was after the board had broken?

A. Yes, sir.

Q. That was the first time you had ever seen it?

A. That is right.

Q. Will you just describe that broken board there, to the jury?

A. Yes, sir. It was a pine board two inches thick, and about seven and one-half inches wide, and seven feet long. At one end of the board it had broken through a cross section area of the board, and in this section was a knot and my examination of the board revealed it had internal decayed portions in the board. The board had been recently painted giving it the appearance of a new board.

Q. You saw all the parts of the board?

A. Yes, I saw all the parts of the board.

Q. Mr. Williams, before that board was broken and the component parts were together was there any apparent defect there, visible to the naked eye?

A. No.

Mr. Godbold:

We object to that.

The Court:

He has answered that he didn't see it.

Mr. Williams:

I did not see it before it was broken.

Mr. Hinson?

Q. But you had the board, you said it had recently been painted over the broken part?

A. That is right, sir.

Q. And it was not in two?

A. Right.

Q. Could you tell from any parts there, just looking at the painted part, without the break in it, that there was any apparent defect in the top part without looking at the end of it?

A. Looking at it from the outside, the external portion of the board, I would say no.

Q. That is all.

Mr. Godbold:

Cross Examination.

The Court:

Q. Did you examine the board sufficiently to determine whether it had what we refer to usually as dry rot?

A. Yes, sir. I did, and there was indications of dry rot on the inside.

Q. Was that visible or observable from the outside view of the board?

A. It was only visible to me, sir, after the board had broken.

Q. Was that from the broken end?

A. Yes, sir.

Mr. Godbold:

Q. Mr. Williams, this is a picture of the board in question. Look at it carefully. You see here one crack which goes down about half way through the board

and here is a series, maybe four or five other cracks lengthwise up the length of that board. Now, were those cracks in the board when you observed it?

A. These in this portion of the board here, yes.

Q. Running up length-wise of the board. They were not filled up, and were plainly visible to the naked eye?

A. That is right.

Q. And this crack running approximately half way down, through the board, is the broken part. That was there and plainly visible?

A. I did not see it before it was broken.

Q. This is a picture after it was broken, at the time this picture was taken after the board was broken?

A. I don't know.

Q. At the time you observed the board, which was after the board was broken, this crack was half way down the board, and was plainly visible, was it not?

A. Yes, sir.

I have no further questions.

Mr. Hinson:

Defendant Coast Line rests.

The Court:

Is that all the evidence?

Mr. Godbold:

We would like to put in a stipulation at this time.

It is stipulated and agreed by and between parties and their counsel of record, that under the Standard

Tables of Mortality in common use throughout the United States, the life expectancy of a man 42 years old, the age of the Plaintiff in this case, is 27 additional years.

Col. Rushton:

Your Honor, we made a motion at the close of Plaintiff's evidence. We wish to make the same motion, identically. The same motion after all the evidence is in.

Col. Rushton:

Speaks to the Court.

The Court:

Well, it seems to me like and that has been my view from the start, about this case, that if one corporation absorbs another and takes it over, the capital stock and all, swallows it up they all become one and the same thing. But that doesn't seem to be the law. I think the law permits corporations to remain, so far as their legal entity is concerned, separate and apart, and one is owned entirely by the other.

That is my view of this case, gentlemen. I mean to instruct the jury that there can be no recovery against the Southern Railway Company as the originating carrier in this case.

What time do you want to argue this case. That leaves it down to the defendant the Coast Line and the Plaintiff.

Mr. Godbold:

We would like a five minute recess to determine whether or not we will amend our complaint, or by-pass the Southern as intermediate carrier.

(A five minute recess was granted.)

Mr. Godbold:

If the Court will allow our exceptions to Your Honor's ruling, we will not amend our complaint.

The Court:

You may have your exceptions to the ruling of the Court.

Mr. Hinson argues to the jury.
Mr. Copeland argues to the jury.
Mr. Godbold sums up to the jury.

Judge's Oral Charge to the Jury.

Gentlemen of the jury, we have now come to the phase of the case that is about the most important from the Judge's standpoint, and also your standpoint, too. In the administration of these laws the function of the Judge of the Court is to try to decide all the questions of law that arise. It is not necessary for me to tell you gentlemen that sometimes in a case of this kind, with very able counsel on both sides, sometimes some very knotty questions of law arise. And we trial judges, and as far as that is concerned even higher Court judges are not infallible. We all make some mistakes. If in the trial of this case, or in the instructions that I am going to give you, gentlemen, if I make a mistake, that is reviewable by a higher

Court. They would take a record of the whole case and the proceedings and decide whether the trial judge made mistakes or not. They would pass on that. You would have no function in bringing into play your own judgment about whether the trial judge was right or wrong under the ruling; that is all with the Courts, not with the jury.

Now, on the matters that are issues of fact, you are the sole judges, as to whether the given required facts as proven in this case—your judgment is the final word on that, unless it should be so contrary to all the testimony in the case that the Judge in the case might feel compelled to set aside your findings in the case and grant a new trial. But your function, when you retire to the jury room to consider this case, you are the sole triers of the issues of fact. And there are some issues of facts in this case that will require your determination.

This is a civil action for damages, Gentlemen of the jury, and originally there was the present defendant the Coast Line Railroad Company and the Southern Railway Company which was also named as defendant. After hearing all of the evidence, considering the argument of counsel, reading the proper cases that I thought were in point on it, the Court is of the opinion and so directs you, that there could be no recovery against the Southern Railway Company, for the reason it looks like from the testimony in the case that this New Orleans and Northeastern Railroad Company was the initial carrier of this car that was alleged to have had this defective running board on it. And the Court is of the opinion that the evidence comclusively shows that it is an absolutely separate Corporation from the Southern Railway Company. Although there is much evidence and the fact

was established that the Southern Railway Company owns all of the capital stock of the New Orleans and Northeastern Railroad Company. It is the view of this Court, and I, as Judge of this Court, that it is permissible under the law for one Corporation to own another Corporation, and still maintain their separate corporate entity. That seems to be the case here, or it seems to be to the Court the case. For that reason I instruct you there can be no recovery agains the Southern Railway Company in this case, or the Southern Railroad Company, a Corporation.

You give your attention and consideration to the testimony in this case and the instructions the Court is going to give you with reference to the Plaintiff and the Defendant Coast Line Railway Company. And in this case, Gentlemen of the jury, it is a little bit complicated for this reason, there are absolutely two separate theories advanced by the plaintiff in this case, asserting his rights of recovery and that is permissible under the law and under our rules of pleading. He doesn't have to state his case just one way, if he has a case that warrants it, he can state it as many ways as is proper in this case, and the Plaintiff has seen proper to predicate his claims and allege violation of what is known in this country as the Interstate Commerce Commission that comes about by the operation of railroads which are largely controlled and regulated by the Interstate Commerce Commission by what is known as the Safety Appliance Act. The Plaintiff sets up in his complaint that the Act was violated in the particular that there was not a safe and secure running board provided that could be used by persons in the use of that car, that the running board was on. And one of the uses would be the unloading of the car, and that would

be true, even after it had been placed on the track for the express purpose of being unloaded. If there was an unsafe appliance, an appliance that was not secure, as defined by the Interstate Commerce Commission regulations, then that would constitute a cause of action on the part of any one in making use of such appliance if he should be injured in the use of the appliance, And that is one of the theories in this case. The other theory of the case is that irrespective of whether the appliance conformed to the requirements of the Interstate Commerce Commission or not; that it was such a compliance and in such a condition that constitutes negligence on the part of the railroad company in having an appliance of that character and with such defects in use and to be made use of by people in and about that car, or even in unloading the car. And in this case, Gentlemen of the jury, it would be rather logical and proper approach for you Gentlemen to first consider what in your judgment, under all the testimony in this case, that there was such an appliance on this car and this particular running board that was an unsafe appliance, and not secure, and that itself was the proximate cause of the Plaintiff's injury, and you have heard the testimony with reference to that.

If you should find that the running board was a safe running board, and that there were no defects in it, that would be the end of the case, so far as the Interstate Commerce Commission's nature of the case is concerned, and the violation of the Safety Appliance Act. Then there would be no violation of the Safety Appliance Act, and there could be no recovery on that count, setting up that right of recovery in this complaint. The complaint is drawn in two counts, setting up both theories on the right of recovery. The

violation of the Safety Appliance Act, and what is known as common law negligence; that irrespective to any regulations of the Interstate Commerce Commission or the Safety Appliance Act, it was negligent to have that running board with defects the plaintiff claims were in the running board, which really was the proximate cause of this man's injury. If you should find there was no violation of the Safety Appliance Act, then you would approach the consideration of the case under the theory that there was negligence. And negligence, as defined in our law, is ordinary lack of proper or due care, and this does not apply to the people that may have manufactured that car, or last had the car in possession, or put it in motion in Interstate Commerce. It applies to any common carrier, any railroad, such as the Atlantic Coast Line Railroad that makes use of the car in that condition. And that would be true so far as the Interstate Commerce feature of the case is concerned and violation of the Safety Appliance Act, and that would be true whether there was an inspection made or not. If there was a defect in the running board, then any casual inspection that may have been made by the defendant would not relieve them of liability under that phase of this case, even though there was a customary ordinary inspection made if there was a defect in that it was defective in that it was made out of material that was partly rotten or there was knots in it, that would cause it to break from ordinary use, such use as was intended and contemplated in the construction of the car, when it was put in Interstate Commerce to be used in hauling of gasoline from New Orleans to Montgomery, Alabama. If that was the cause of the injury, and if that was a defective running board, in that it was not secure, as defined by

the regulations of Interstate Commerce Commission, then any casual inspection that may have been made, or even any inspecton made by the defendant railroad company would not relieve them from liability, because it was the intent of Congress in enacting this Safety Appliance Act, passed on the railroad companies, and they did file the Act, the responsibility of making secure and safe all these appliances that are mentioned in the act that were to be made use of by the employees of the railroad or other people that would have occasion to make use of such car in the ordinary transaction of commerce that would be handled in the tank cars such as hauling gasoline from New Orleans to Montgomery, Alabama.

Now, Gentlemen of the jury, you first consider all of this testimony under both these phases of this case, as to negligence on the part of the railroad, if you figure that the evidence shows that they were negligent, then the burden is on the Plaintiff, to show that they were negligent. If you find from the evidence that they were negligent about this running board, and the condition it was in when they assume the responsibility and the duty of hauling it, even a short distance, on its sidetracks in Montgomery, Alabama, after it arrived here, and placing it to be unloaded, they assumed the responsibility that follows, if there was a violation of the Safety Appliance Act, in the condition and in the defect in this appliance that is generally referred to throughout this trial as a running board. Or if a defect was there and not such a defect as was defined in the Safety Appliance Act, if you find that they were negligent in making a proper inspection of it, that only comes into play under the theory about negligence. If they made the proper inspection of it and there was no defect that

Federal Safety Appliance Act would have no application in this case.

Refused:

C. B. KENNAMER,
Judge.

16. The Court instructs the jury that it it believes that the proximate cause of plaintiff's alleged injury was the negligence of some other railroad or of the party furnishing the tank car to the shipper, such negligence cannot be imputed to the defendant Atlantic Coast Line Railroad Company and said defendant cannot be held chargeable with such other negligence.

Refused:

C. B. KENNAMER,
Judge.

17. The Court instructs the jury that the primary duty of furnishing a safe car to the shipper rests with the car service or initial carrier furnishing the car and the only duty resting on an intermediate carrier or delivering carrier is to give such a car an inspection as is customarily made by reasonably prudent inspectors inspecting cars for delivering carriers in the railroad business.

February 23, 1954.

.....,
Attorneys for defendant, Atlantic Coast Line Railroad Company.

Refused:

C. B. KENNAMER,
Judge.

was discernible or could be ascertained from such an inspection and they made the usual customary inspection, by people that were competent to make such an inspection and the only defect was a latent defect, that would not be discovered by such an inspection, then there could be no recovery under the negligence count of this complaint.

The case is with you, Gentlemen of the jury, under both theories under all the testimony you have heard here, both as to the violation of the Safety Appliance Act and as to common law negligence, in that there was a defect, or there might have been a defect, that any proper inspection of the car would have disclosed to the defendant.

But he can only plead successfully and urge successfully as a defense in this case, the inspection of the car by its inspectors and the nature of its inspection as a defense against the claim under the negligent theory of the complaint. That does not apply if you find that there was a violation of the Interstate Commerce Commission's regulations, in that this running board in and of itself was in such condition that it was insecure and unsafe for use by the Plaintiff at the time he was making a use of it that is permissible under the law, and that he had a right to make such use of.

You first determine, Gentlemen of the jury, whether the Plaintiff is entitled to recover under either theory of this complaint. It is not necessary for you to designate in your findings which theory you predicate your finding under. If you find that the Plaintiff is entitled to recover under either theory of this case, then your next approach would be to another very important function that you perform in the trial of this case. If you decide that the Plaintiff is entitled to

recover; then the next step is the measure of damages that he is entitled to recover under this evidence in this complaint. And that, Gentlemen of the jury, is with you, and entirely with you, in your sound judgment and discretion as intelligent and sensible men attempting to do right and justice by this Plaintiff and this Defendant in this case.

Now, the measure of damages that you are to assess in this case, if you find that the Plaintiff is entitled to recover damages, and in that connection, if you find that he is not entitled to recover any damages then you don't need to bother about any measure of damages, because the end of the suit would be if you decided that he is not entitled to recover any amount at all, because your verdict then would simply be, "We the jury find the issues in favor of the Defendant." But if you find that he is entitled to recover for the injuries he has suffered under either theory that I have explained to you then your next important function is the amount of damages that he is entitled to recover. And in that connection the amount set up and claimed in the complaint, has nothing whatever to do with the amount you should award except that you could not to beyond that and award any more than that amount. But it is within your sound discretion and judgment under the facts and circumstances of this case to award any amount less than the amount set up, $25,000, that is set up and complained in the complaint. All that is absolutely with you, Gentlemen of the jury. The Judge of the Court has nothing whatsoever to do with that. That is a jury proposition and you apply this evidence, apply all the facts and circumstances proven in this case and award such amount, if you find that the Plaintiff has carried the burden of proof

MOTION FOR DIRECTED VERDICT.

(Title Omitted.)

Comes the defendant and moves this Honorable Court to direct the jury to return a verdict for the defendant Atlantic Coast Line Railroad Company in this case and assigns as grounds the following:

1. The undisputed evidence shows that the defendant, Atlantic Coast Line Railroad Cmpany, was not guilty of any negligence which contributed to plaintiff's accident or injuries in that said defendant made an inspection of the car from which the plaintiff fell, such inspection was the usual and customary inspection given to such cars and such inspection disclosed no defect in or about said car and further that the defect in the dome platform was a latent or hidden defect which could not be ascertained by a reasonable inspection of said car.

2. The undisputed evidence shows that the defendant, Atlantic Coast Line Railroad Company, did not furnish the car from which the plaintiff fell but was merely the delivering carrier, receiving said car from another railroad, and said Atlantic Coast Line Railroad hauled said car only the distance from its Day Street Yard to a side track, a distance of approximately three-quarters (3/4) of a mile.

3. The undisputed evidence shows that defendant Atlantic Coast Line Railroad did not furnish or supply the tank car referred to in Plaintiff's complaint and that said tank car was delivered to said defendant Atlantic Coast Line Railroad at Montgomery, Ala-

and that he is entitled to recover any amount at all, then you award such amount as in your sound judgment would be right proper and just in this case.

Now, there has been considerable testimony offered here by doctors that treated the Plaintiff after his injury was received, and you have heard all that evidence. It is in evidence that he fell off this running board, he fell about ten feet, and he got up and went about his business and he went over and reported it to some of the officials of the railroad company and for at least a time went about his usual occupation. Later on he went to his physician, and you have heard what the physician said in his testimony before you, and the testimony of all these doctors, Dr. Kocour, Dr. Kaise, and the other man, who was a neuro-surgeon, I don't recall his name. You have heard his testimony and the condition they found the man in and the symptoms that he displayed and what their diagnoses were of his condition and the effect that in their medical opinion believe it had on the state of his health since then, and that it will probably have on the state of his health for an indefinite time to come. All that is to be considered and applied in this case, Gentlemen of the jury, in awarding, if you award damages at all and the measurement of the damages that you award.

He would also be entitled to recover, Gentlemen of the jury, and all of these damages are what we call compensatory. There is no punitive damages by way of a penalty to be imposed in a suit of this kind. It is all to properly compensate the Plaintiff for the pain and suffering that he may have undergone, the physical injuries that he may have suffered, and that he may suffer in the future. And also hospital and medical bills that he incurred and the loss of time,

bama by another railroad at Montgomery, Alabama and said defendant Atlantic Coast Line Railroad hauled said tank car as a switching carrier only from its Day Street Yard to a short bulk track, a distance of approximately 3/4 of a mile where said tank car was placed to be unloaded by the consignee and said defendant.

4. The undisputed evidence shows that the part of the tank car that broke or gave way, to-wit: the short dome step board at the top of the tank car, and from which plaintiff fell and sustained his alleged injuries, was not within the purview of the Federal Safety Appliance Act and in particular was not within the purview and was not covered by Title 45, United States' Code Annotated, Section 11 in that the Interstate Commerce Commission of the United States has not designated aforesaid dome step as coming under or being within the purview of the Federal Safety Appliance Act, as is provided by Title 45, Section 12 of the United States Code Annotated.

5. The undisputed evidence shows that the alleged defective car was not "in use" on the lines of the Atlantic Coast Line Railroad at the time of the accident but that said car had been delivered to, turned over to, and surrendered to the consignee for unloading by the consignee at the time of the accident.

6. The undisputed evidence shows that the tank car in question was handled or hauled by the defendant Atlantic Coast Line Railroad only in a switching movement for a distance of about 3/4 of a mile. Said switchng movement being made at the request of the Western Railway of Alabama and said West-

that he may have lost, if any, from his employment or usual means of earning wages for a livelihood. And on all that, Gentlemen of the jury, you heard all of the testimony and you apply all of it and give all of it its proper place and then write such verdict as in your sound judgment is right and fair and just under the circumstances and facts in the case.

Now, the Defendant has requested a number of written charges which under our law, is entirely permissible. You take these written charges that I give you in charge in connection with the oral charge that I have given you, they do not take the place of the oral charge but they are taken in connection with it, and the statements as the Court uses, the correct principals of law that should govern you in the discharge of your duty in this case. The fact that they are given in writing has no more effect than if they had been incorporated in the oral charges I have given you.

"The Court instructs the jury that the Defendant, Atlantic Coast Line Railroad Company is not required to make a complete, and thorough inspection of every detail of every freight car which it receives from other railroads as a delivering carrier, but it can only be held for damages resulting from the breaking of a defective timber of a car which was discoverable by reasonable, careful inspection by competent inspectors of cars."

Now, Gentlemen of the jury, that charge is only applicable to the theory of the case that is predicated on negligence. That would have no application if you should find there was a violation of the Safety Appliance Act in the condition of that running board that brought about the injury, then that charge would have no effect, and should be disregarded.

ern Railway of Alabama never turned over to the defendant Atlantic Coast Line Railroad the papers and documents in reference to said tank car but the Western Railway of Alabama made all negotiations with the consignee for the delivery of said car including notifying said consignee of the delivery of said car and accepting and receipting all bills of ladin and other papers for receiving said car.

7. From the evidence presented in this case it affirmatively appears that the defendant, Atlantic Coast Line Railroad, was guilty of no negligence which contributed to plaintiff's alleged injury.

8. It affirmatively appears from the evidence presented in this case that the agents, servants or employees of the defendant, Atlantic Coast Line Railroad, in inspecting and handling the freight car involved, acted as reasonably prudent agents, servants or employees similarly engaged in the business of inspecting and handling railroad cars in the general operation of the railroad business.

Respectfully submitted,
EVANS HINSON,
Attorney for Defendant, Atlantic Coast Line Railroad.
D. N. HAMILTON,
Attorney for Defendant, Atlantic Coast Line Railroad.

Denied this 24th day of Feb., 1954.
C. B. KENNAMER,
Judge.

Filed Feby. 24, 1954.

(Title Omitted.)

Comes Southern Railway Company, a corporation, one of the defendants in the above-entitled cause, at the close of all the evidence in the case, and moves the Court to direct a verdict in favor of this defendant, Southern Railway Company, under each count of plaintiff's complaint, as amended, and assigns the following separate and several grounds, to-wit:

1. That there is no evidence of negligence of this defendant, Southern Railway Company;

2. That after drawing all reasonable inferences from the evidence in favor of the plaintiff, the evidence does not establish facts sufficient to sustain a verdict in favor of the plaintiff against this defendant, Southern Railway Company;

3. That there is no evidence that defendant, Southern Railway Company, was the originating carrier of the tank car as alleged in the complaint;

4. That there is a fatal variance between the allegations of the plaintiff's complaint and the proof in that there is no evidence that defendant, Southern Railway Company, was the originating carrier of the tank car as alleged in the complaint;

Respectfully submitted,
RUSHTON, STAKELY & JOHNSTON,
PETTUS, FULLER, REEVES & STEWART,
By E. A. STEWART and MARION RUSHTON,
Of Counsel for defendant, Southern Railway Company.

Filed February 24, 1954.

"The Court instructs the jury that the Defendant Altantic Coast Line Railroad is not held to as high degree of care in making inspection of a car delivered to it as the delivering carrier for a switching operation as is the initial carrier, or the carrier furnishing the car."

Now, that is applicable only to the theory of negligence in this case, and has nothing to do with your findings, if you find there was a violation of the Safety Appliance Act in that the running board was insecure and dangerous in and of itself. The matter of inspection doesn't come into play at all.

Now, under the negligent phase of the case, Gentlemen of the jury, even if you should find that there was a defect in the running board, if you beleve it was a hidden and latent defect that would not be discernible or observable by ordinary and reasonable inspection of the car, then there could be no recovery on the theory that there was any negligence on the part of the Defendant in this case. That is only applicable to the negligence theory of the case.

If you find in favor of the Plaintiff in this case, Gentlemen of the jury, the proper finding would be, "We the jury find the issues in favor of the Plaintiff, against the Defendant Coast Line Railroad Company. And we assess the damages at"—such amount as you see right and proper under all of the facts and circumstances of this case.

If you should find the issues in favor of the Defendant under both theories of the case, the form of your finding would be: "We the jury find the issues in favor of the Defendant."

Now, I don't know of anything further that I could say that would be of any help to you Gentlemen, in the responsible duty that devolves upon you in the,

trial of this case. You have patiently heard all of this testimony. I do again repeat and charge you that it is your duty to not try the case on any one single feature of the case or testimony, or on something that you believe or disbelieve about any particular witness, as to whether he was fair or impartial or exaggerated his testimony, one way or the other. But you consider all the testimony, and each feature of the testimony and apply it all to the case. There is this rule that applys to the Plaintiff, himself, Gentlemen of the jury, that he is an interested party and you weigh and scrutinize his testimony in the light of the fact that he is interested in the amount that may be awarded as damages in this case, and you weigh that and give play to that feature of the testimony in considering his testimony as to the nature of his injuries and how much he has suffered and his present condition. But that doesn't apply Gentlemen of the jury, to the testimony of the physicians who examined him. Their testimony is right and proper for you to consider in the determination of the issues in this case and the amount of damages, if you award any damages at all, as to what should be the proper amount.

I believe that is all that I can think of that I can say that would be of any help to you, Gentlemen of the jury, now retire, and take whatever time that is necessary to properly consider this testimony and all the facts and circumstances around the case and try to render what you consider a fair and right and just verdict in the case.

Jury Foreman:

Your Honor, may I ask a question?

FINAL JUDGMENT.

In the District Court of the United States for the Middle District of Alabama, Northern Division.

Civil Action, File No. 896-N.

W. A. Shields, Plaintiff,

vs. Civil #896-N.

Atlantic Coast Line Railroad Company, a corporation, and Southern Railway Company, a corporation, Defendants.

On the 23rd day of February, 1954, the above styled cause came on to be heard in this Court. The plaintiff, W. A. Shields, appeared in person and by his attorneys, Albert W. Copeland and John C. Godbold, of the firm of Godbold & Hobbs, of Montgomery, Alabama, and the defendnat, Atlantic Coast Line Railroad Company, appeared in person by its attorneys, Evans Hinson and Drayton Hamilton, of Montgomery, Alabama, and the defendant, Southern Railway Company, a corporation, appeared in person by its attorneys, E. A. Stewart, of the firm of Pettus, Fuller, Reeves & Stewart, of Selma, Alabama, and Marion Rushton, of the firm of Rushton, Stakely & Johnston, of Montgomery, Alabama.

Both parties announced ready for trial, after which a jury was duly empanelled and sworn. The cause was then tried before the Court and jury and at the conclusion of all the evidence, the Court announced that it granted the motion of defendant, Southern Railway Company, a corporation, that a verdict be directed in its favor, and thereupon the Court instruct-

The Court:
Yes, sir.

Jury Foreman:
Do I understand correctly that we have to determine whether or not that running board was a Safety Appliance Act or a safety appliance as defined by the Act, or merely an unsafe appliance or a safe appliance?

The Court:
It would be for you to decide. The safety appliance act does say that the running boards must be secure. Now as to whether this was a secure running board under the testimony in this case, that is for you gentlemen to determine. It is in evidence in this case, I don't see that it has any particular function here, that it was being made use of by the Plaintiff himself, it did not break, but when he called another party and asked him to step on it, it did break. Now, whether it would have been secure if there had only been one person using it, I don't know. I guess on a running board of that kind it was contemplated probably that at times there would be more than one person using it. I just don't know about that, all that is with you. Gentlemen you may retire.

Mr. Hinson:
May we enter our objections to the charge before the jury retires?

The Court:
Yes, if you want to.

ed the jury that it could not return a verdict in favor of the plaintiff against the defendant, Southern Railway Company, a corporation.

Thereupon the jury returned the following verdict, to-wit:

"We, the jury, find the issued in favor of the plaintiff and assess the damages against the defendant, Atlantic Coast Line Railroad Company in the amount of $7500.00.

WILLIS B. McGOWIN,
Foreman."

It is accordingly Ordered, Adjudged And Decreed by the Court that the plaintiff have and recover of the defendant, Atlantic Coast Line Railroad Company, the sum of $7500.00 as damages, and that the plaintiff have and take nothing by this suit against Southern Railway Company, a corporation, and that all costs of Court in this cause herein be and the same are hereby taxed against the defendant, Atlantic Coast Line Railroad Cmpany, for which execution may issue.

Done this 26th day of February, 1954.

C. B. KENNAMER,
United States District Judge.

Filed Feb. 26, 1954.

Mr. Hinson:

The Defendant the Atlantic Coast Line Railroad objects to that part of his Honor's oral charge to the jury wherein he instructed the jury that the Federal Safety Appliance Act was applicable in this case.

The Defendant further objects to that part of his Honor's oral charge wherein he charged the jury that the Defendant would be liable under the Federal Safety Appliance Act, even though the total movement of the car was a switching movement.

The Defendant further objects to that part of his Honor's oral charge wherein he instructed the jury that any negligence on the part of the Plaintiff would not be applicable under the Federal Safety Appliance Act. And the Defendant further objects to His Honor's oral charge and his failure to give the jury the instructions requested in writing by the Defendant, No. 2, No. 4 through No. 17, which instructions were submitted to the Court in writing.

The Court:

I think that is a matter of law. In the practice of law you may have exception to all requested charges.

The Court:

Mr. Godbold, are you going to object to any of the oral charges?

Mr. Godbold:

No, sir. The Plaintiff is satisfied, Your Honor.

* * * * * * * *

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND/OR IN THE ALTERNATIVE, MOTION FOR NEW TRIAL.

(Title Omitted.)

Comes the defendant, Atlantic Coast Line Railroad Company, a corporation, and moves the Court to set aside the verdict of the jury and any judgment entered thereon notwithstanding the verdict of the jury, and to enter a judgment in favor of the defendant, Atlantic Coast Line Railroad Company in accordance with its motion for directed verdict or if the foregoing motion be denied to set aside the verdict and any judgment entered thereon and grant said defendant a new trial for the following reasons:

1. The verdict is contrary to law.

2. The verdict is contrary to the evidence.

3. The verdict is contrary to the weight of the evidence.

4. The verdict is contrary to the law and the evidence.

5. There is no substantial evidence that the defendant is guilty of negligence.

6. The Court erred in denying defendant's motion to direct a verdict in its favor at the close of all evidence.

GIVEN CHARGES.

1. The Court instructs the jury that the defendant Atlantic Coast Line Railroad Company is not required to make a complete and thorough inspection in every detail of every freight car which it receives from other railroads as a delivering carrier, but it can only be held for damages resulting from the breaking of a defective timber of a car which was discoverable by a reasonably careful inspection by a competent inspector of cars.

Given:

C. B. KENNAMER,
Judge.

3. The Court instructs the jury that the defendant Atlantic Coast Line Railroad Company is not held to as high a degree of care in making the inspection of a car delivered to it as a delivering carrier or for a switching operation as is the initial carrier or the carrier furnishing the car.

Given:

C. B. KENNAMER,
Judge.

REFUSED CHARGES.

2. The Court instructs the jury that the defendant Atlantic Coast Line Railroad Company is not liable for damages resulting from a defect if there were no outward indications of such defect and such defect

7. There is no sufficient or substantial evidence tending to support the amount of the jury's verdict.

8. The verdict is excessive and appears to have been given under the influence of passion and prejudice.

9. The Court erred in overruling said defendant's motion to strike Count I of plaintiff's complaint, which Count is predicated on an alleged violation by the defendant of the Federal Safety Appliance Act.

10. The Court erred in granting the motion of the defendant Southern Railroad Company to strike said Southern Railroad Company as a party defendant in this cause.

11. The Court erred in granting the motion of the defendant, Southern Railroad Company to dismiss Southern Railroad Company as a party defendant in this case.

12. The Court erred in dismissing the case as to the defendant, Southen Railroad Company.

13. The Court erred in instructing the jury that it could not return a verdict against the defendant, Southern Railroad Company.

14. The Court erred in refusing to give to the jury the following instruction in writing, which instruction was requested by the defendant, Atlantic Coast Line Railroad Company;

was not discoverable by a visual inspection of the freight car and the defendant Atlantic Coast Line Railroad is not required to make an inspection by tapping and testing the platforms and running boards of a car it received from another railroad with a hammer or other instrument to discover hidden defects.

Refused:

C. B. KENNAMER,
Judge.

4. The Court instructs the jury that if it believes from the evidence that the custody and control of the tank car in question remained in the Western Railway of Alabama until said car was turned over to the consignee for unloading, and that the defendant Atlantic Coast Line Railroad merely handled said freight car in a switching movement from one part of town to the other for the Western Railroad of Alabama, then the defendant, Atlantic Coast Line Railroad Company would not be liable in this case, unless the defect was one that was visible and apparent to the said Atlantic Coast Line Railroad.

Refused:

C. B. KENNAMER,
Judge.

See, Jacobs vs. Illinois Central, 63 Sou 306, followed by Fifth U. S. Circuit Court of Appeals in 204 Federal 2d, 252. Authority for Instructions No. 1, 2, 3 and 4.

5. The Court instructs the jury that the regulations and standards as set forth by the Interstate Commerce

Instruction No. 2. The Court instructs the jury that the defendant Atlantic Coast Line Railroad Company is not liable for damages resulting from a defect if there were no outward indications of such defects and such defect was not discoverable by a visual inspection of the freight car and the defendant Atlantic Coast Line Railroad is not required to make an inspection by tapping and testing the platforms and running boards of a car it received from another railroad with a hammer or other instrument to discover hidden defects.

15. The Court erred in refusing to give to the jury the following instruction in writing, which instruction was requested by the defendant, Atlantic Coast Line Railroad Company;

Instruction No. 4. The Court instructs the jury that if it believes from the evidence that the custody and control of the tank car in question remained in the Western Railway of Alabama until said car was turned over to the consignee for unloading, and that the defendant Atlantic Coast Line Railroad merely handled said freight car in a switching movement from one part of town to the other for the Western Railroad of Alabama, then the defendanat, Atlantic Coast Line Railroad Company would not be liable in this case, unless the defect was one that was visible and apparent to the said Atlantic Coast Line Railroad Company.

16. The Court erred in refusing to give to the jury the following instruction in writing, which instruction was requested by the defendant, Atlantic Coast Line Railroad Company;

Commission in accordance with the Federal Safety Appliance Act do not cover or apply to the dome step board or running board that broke in this accident.

Refused:

C. B. KENNAMER,
Judge.

6. The Court instructs the jury that the board that broke in this accident is not a safety appliance as contemplated by the Federal Safety Appliance Act.

Refused:

C. B. KENNAMER,
Judge.

7. The Court instructs the jury that Section 12, Title 45 of the U. S. Code provides that "The number, dimensions, location and manner of application of the appliances provided for by Sections 4 and 11 of this Title (Safety Appliances and Equipment) as designated by the Interstate Commerce Commission shall remain as standards of equipment to be used on all cars subject to the provisions of Sections 1—16 of this Title" and since the Interstate Commerce Commission has not designated or set forth any standard or rule relating to the board which broke in this accident, the Federal Safety Appliance Act is not applicable in this case.

Refused:

C. B. KENNAMER,
Judge.

8. The Court instructs the jury that Section 12, Title 45 of the U. S. Code provides that "The number, dimensions, location and manner of application of the appliances provided for by Sections 4 and 11 of this Title (Safety Appliances and Equipment) as designated by the Interstate Commerce Commission shall remain as standards of equipment to be used on all cars subject to the provisions of Sections 1—16 of this Title", and if you believe that the Interstate Commerce Commission has not set forth any standards relatng to the board which broke in this accident then the Federal Safety Appliance Act has no application in this case.

Refused:

C. B. KENNAMER,
Judge.

9. The Court instructs the jury that it cannot return a verdict against the defendant, Atlantic Coast Line Railroad Company unless the plaintiff has reasonably satisfied the jury that said defendant Atlantic Coast Line Railroad Company or its agents or employees were guilty of negligence which proximately contributed to plaintiff's alleged injuries.

Refused:

C. B. KENNAMER,
Judge.

10. The Court instructs the jury that before you can return a verdict against the defendant, Atlantic Coast Line Railroad, you must be reasonably satisfied from the evidence that said defendant failed to do that which a reasonably prudent person would have done

under the same circumstances or that said defendant did some act which a reasonably prudent person would not have done under the same circumstances and if you believe from the evidence that said defendant Atlantic Coast Line Railroad conducted its business as a reasonably prudent person would have done under the same circumstances then you cannot return a verdict against the Atlantic Coast Line Railroad.

Refused:

C. B. KENNAMER,
Judge.

11. The Court instructs the jury that if you believe from the evidence that the car inspector of the defendant Atlantic Coast Line Railroad Company made such an inspection of the car in question as is customarily made by reasonably prudent persons inspecting cars for railroads that receive cars as intermediate or delivery carriers and that the defect in the board which broke was not discoverable or apparent to such an inspection then you cannot return a verdict against the defendant Atlantic Cost Line Railroad.

Refused:

C. B. KENNAMER,
Judge.

12. The Court instructs the jury that if you believe from the evidence that the car inspector of the defendant Atlantic Cost Line Railroad Company made such an inspection of the car in question as is customarily made by reasonably prudent persons inspecting

cars for railroads that receive cars as intermediate or delivering carriers and that the defect in the board which broke was not discoverable or apparent to such an inspection then the defendant Atlantic Coast Line Railroad would not be guilty of any negligence in inspecting the car in question.

Refused:

C. B. KENNAMER,
Judge.

13. The Court instructs the jury that if it believes from the evidence in this case that the defect in the board that broke was a latent or hidden defect which was not discoverable by an inspection such as is customarily made by reasonably prudent car inspectors inspecting cars for delivering carriers in the railroad business then you cannot return a verdict against the defendant Atlantic Coast Line Railroad Company.

14. The Court instructs the jury that regardless of the name by which the board that broke was called by railroad employees, the board did not come under the Federal Safety Appliance Act unless such was the intent of the act.

Refused:

C. B. KENNAMER,
Judge.

15. The Court instructs the jury that it it believes from the evidence that the tank car in question was not in operation on defendant Atlantic Coast Line Railroad's line at the time of the accident then the

Instruction No. 14. The Court instructs the jury that regardless of the name by which the board that broke was called by railroad employees, the board did not come under the Federal Safety Appliance Act unless such was the intent of the Act.

26. The Court erred in refusing to give to the jury the following instruction in writing, which instruction was requested by the defendant, Atlantic Coast Line Railroad Company;

Instruction No. 15. The Court instructs the jury that if it believes from the evidence that the tank car in question was not in operation on defendant Atlantic Coast Line Railroad's line at the time of the accident, then the Federal Safety Appliance Act would have no application in this case.

27. The Court erred in refusing to give to the jury the following instruction in writing, which instruction was requested by the defendant, Atlantic Coast Line Railroad Company;

Instruction No. 16. The Court instructs the jury that if it believes that the proximate cause of the plaintiff's alleged injury was the negligence of some other railroad or of the party furnishing the tank car to the shipper, such negligence cannot be imputed to the defendant Atlantic Coast Line Railroad Company and said defendant cannot be held chargeable with such other negligence.

28. The Court erred in refusing to give to the jury the following instruction in writing, which instruction was requested by the defendant, Atlantic Coast Line Railroad Company;

Instruction No. 17. The Court instructs the jury that the primary duty of furnishing a safe car to the shipper rests with the car service or initial carrier furnishing the car and the only duty resting on an intermediate carrier or delivering carrier is to give such a car an inspection as is customarily made by reasonably prudent inspectors inspecting cars for delivering carriers in the railroad business.

29. The Court erred in qualifying the written instructions requested by said defendant, Atlantic Coast Line Railroad Company, Number 1, which instruction was as follows:

Instruction No. 1. The Court instructs the jury that the defendant Atlantic Coast Line Railroad Company is not required to make a complete and thorough inspection in every detail of every freight car which it receives from other railroads as a delivering carrier, but it can only be held for damages resulting from the breaking of a defecitive timber of a car which was discoverable by a reasonably careful inspection by a competent inspector of cars.

by qualifying this instruction and instructing the jury that said instruction was applicable only to Count II of plaintiff's complaint.

30. The Court erred in qualifying the written instruction requested by said defendant, Atlantic Coast Line Railroad Company, Number 3, which instruction was as follows:

Instruction No. 3. The Court instructs the jury that the defendant Atlantic Coast Line Railroad Com-

pany is not held to as high a degree of care in making the inspection of a car delivered to it as a delivering carrier or for a switching operation, as is the initial carrier or the carrier furnishing the car.

by qualifying this istruction and instructing the jury that said instruction was applicable only to Count II of plaintiff's complaint.

31. The Court erred in instructing the jury in its oral charge to the effect that the Federal Safety Appliance Act was applicable in this case, to which instruction said defendant duly objected.

32. The Court erred in instructing the jury in its oral charge to the effect that if the jury believed from the evidence that the defendant, Atlantic Coast Line Railroad Company violated the Federal Safety Appliance Act, said defendant would be liable to the plaintiff for damages resulting from such violation; to which instruction the said defendant duly objected.

33. The Court erred in instructing the jury in its oral charge to the effect that if they believed that there was a defect, either latent or patent, in the dome step board then the said defendant would be liable for any damage to the plaintiff resulting from said defect; to which instruction the said defendant duly objected.

34. The Court erred in overruling the objection made by the defendant, Atlantic Coast Line Railroad Company to its oral charge; after ruling the defendant, duly excepted.

35. The Court erred in its ruling and instruction that as a matter of law the Federal Safety Appliance Act was applicable under the evidence in this case.

Respectfully submitted,

EVANS HINSON,
D. N. HAMILTON,
Attorneys for the defendant,
Atlantic Coast Line Railroad Company.

This is to certify that I have mailed a copy of the foregoing motion to Hon. John Godbold, one of the attorneys of record for the plaintiff, Hon. Edgar A. Stewart and Hon. Marion Rushton, Counsel and attorney of record for the defendant, Southern Railway Company, this 6th day of March, 1954.

EVANS HINSON,
Attorney for defendant,
Atlantic Coast Line Railroad Company.

Filed March 6, 1954.

ORDER DENYING MOTION FOR NEW TRIAL.

(Title Omitted.)

The motion of the defendant Atlantic Coast Line Railroad Company, filed in this Court on the 6th day of March, 1954, for judgment notwithstanding the verdict or in the alternative a motion for a new trial, having been considered and understood by the Court,

and counsel for the respective parties having been heard on the motion;

It is ordered that said motion be, and is, overruled and denied.

This 18th day of March, 1954.

C. B. KENNAMER,
United States District Judge.

Filed March 18, 1954.

NOTICE OF APPEAL.

United States District Court for the Middle District of Alabama, Northern Division.

Civil Action, File No. 896-N.

W. A. Shields, Plaintiff,

vs.

Atlantic Coast Line Railroad Company, a corporation, and Southern Railroad Company, Defendants.

Notice is hereby given that Atlantic Coast Line Railroad Company, a corporation, defendant above named, hereby appeals from the judgment of this Court, entered February 26, 1954, and the Order of this Court overruling said defendant's motion for judgment notwithstanding the verdict and in the alterna-

tive motion for a new trial entered March 18, 1954, to the U. S. Court of Appeals for the Fifth Circuit.

EVANS HINSON,
D. N. HAMILTON,
Attorneys for Appellant, Atlantic Coast Line Railroad Company, a corporation.

26 South Perry St.,
Montgomery, Ala.

This is to certify that I have mailed by U. S. Mail, postage paid, a copy of the Notice of Appeal and Statement of Points filed in this case to Mr. John Godbold, Montgomery, Alabama, attorney for plaintiff, and to Mr. Edgar Stewart, Pettus, Fuller, Reeves and Stewart, Selma, Alabama, of counsel for the Southern Railroad Company.

March 24, 1954.

EVANS HINSON,
Of Counsel for the Defendant Atlantic Coast Line Railroad Company.

Filed March 25, 1954.

STATEMENT OF POINTS.

(Title Omitted.)

The points upon which appellant, Atlantic Coast Line Railroad Company, a corporation, will rely on appeal are:

1. The Court erred in overruling said defendant's motion to strike Count I of plaintiff's amended complaint.

2. The Court erred in refusing to direct a verdict in favor of said defendant.

3. The Court erred in instructing the jury that the Federal Safety Appliance Act was applicable in this case.

4. The Court erred in instructing the jury that the dome step board or running board that broke in the accident was a safety appliance as contemplated by the Federal Safety Appliance Act.

5. The Court erred in instructing the jury that since the Federal Safety Appliance Act was applicable in this case, the contributory negligence of the plaintiff would not constitute a defense as to Count I of plaintiff's complaint.

6. The Court erred in instructing the jury that since the Federal Safety Appliance Act was applicable in this case, the defendant would be liable for any defect in the dome step board or running board which broke if said defect contributed to plaintiff's injuries.

regardless of whether said defect was discoverable by a reasonale inspection by plaintiff or not.

7. The Court erred in refusing to give to the jury the following instruction in writing, which instruction was requested by the defendant, Atlantic Coast Line Railroad Company:

Instruction No. 2. The Court instructs the jury that the defendant Atlantic Coast Line Railroad Company is not liable for damages resulting from a defect if there were no outward indications of such defect and such defect was not discoverable by a visual inspection of the freight car and the defendant Atlantic Coast Line Railroad is not required to make an inspection by tapping and testing the platforms and running boards of a car it received from another railroad with a hammer or other instrument to discover hidden defects.

8. The Court erred in refusing to give to the jury the following instructions in writing, which instruction was requested by the defendant, Atlantic Coast Line Railroad Company;

Instruction No. 4. The Court instructs the jury that if it believes from the evidence that the custody and control of the tank car in question remained in the Western Railway of Alabama until said car was turned over to the consignee for unloading, and that the defendant Atlantic Coast Line Railroad merely handled said freight car in a switchng movement from one part of town to the other for the Western Railroad of Alabama then the defendant, Atlantic Coast Line Railroad Company would not be liable in

this case, unless the defect was one that was visible and apparent to the said Atlantic Coast Line Railroad Company.

9. The Court erred in refusing to give to the jury the following instruction in writing, which instruction was requested by the defendant, Atlantic Coast Line Railroad Company:

Instruction No. 5. The Court instructs the jury that the regulations and standards as set forth by the Interstate Commerce Commission in accordance with the Federal Safety Appliance Act do not cover or apply to the dome step board or running board that broke in this accident.

10. The Court erred in refusing to give to the jury the following instruction in writing, which instruction was requested by the defendant, Atlantic Coast Line Railroad Company:

Instructon No. 6. The Court instructs the jury that the board that broke in this accident is not a safety appliance as contemplated by the Federal Safety Appliance Act.

11. The Court erred in refusing to give to the following instruction in writing, which instruction was requested by the defendnt, Atlantic Coast Line Railroad Company:

Instruction No. 7. The Court instructs the jury that Section 12, Title 45 of the U. S. Code provides that "The number, dimensions, location and manner of application of the appliances provided for by Sections

4 and 11 of this Title (Safety Appliances and equipment) as designated by the Interstate Commerce Commission shall remain as standards of equipment to be used on all cars subject to the provisions of Sections one through 16 of this Title" and since the Interstate Commerce Commission has not designated or set forth any standard or rule relating to the board which broke in this accident, the Federal Safety Appliance Act is not applicable in this case.

12. The Court erred in refusing to give to the jury the following instruction in writing, which instruction was requested by the defendant, Atlantic Coast Line Railroad Company;

Instruction No. 8. The Court instructs the jury that Section 12, Title 45 of the U. S. Code provides that "The number, dimensions, location and manner of application of the appliances provided for by Sections 4 and 11 of this Title (Safety Appliances and equipment) as designated by the Interstate Commerce Commission shall remain as standards of equipment to be used on all cars subject to the provisions of Sections 1—16 of this title" and if you believe that the Interstate Commerce Commission has not set forth any standards relating to the board which broke in this accident then the Federal Safety Appliance Act has no application in this case.

13. The Court erred in refusing to give to the jury the following instruction in writing, which instruction was requested by the defendant, Atlantic Coast Line Railroad Company:

Instruction No. 9. The Court instructs the jury that it cannot return a verdict against the defendant, Atlantic Coast Line Railroad Company unless the plaintiff has reasonably satisfied the jury that said defendant, Atlantic Coast Line Railroad Company or its agents or employees were guilty of negligence which proximately contributed to the plaintiff's alleged injuries.

14. The Court erred in refusing to give to the jury the following instruction in writing. which instruction was requested by the defendant, Atlantic Coast Line Railroad Company;

Instruction No. 10. The Court instructs the jury that before you can return a verdict against the defendant, Atlantic Cost Line Railroad, you must be reasonably satisfied from the evidence that said defendant failed to do what a reasonably prudent person would have done under the same circumstances or that said defendant did some act which a reasonably prudent person would not have done under the same circumstances and if you believe from the evidence that said defendant Atlantic Cost Line Railroad Company conducted its business as a reasonably prudent person would have done under the same circumstances then you cannot return a verdict against the Atlantic Coast Line Railroad Company.

15. The Court erred in refusing to give to the jury the following instruction in writing, which instruction was requested by the defendant, Atlantic Coast Line Railroad Company;

Instruction No. 5. The Court instructs the jury that the regulations and standards as set forth by the Interstate Commerce Commission in accordance with the Federal Safety Appliance Act do not cover or apply to the dome step board or running board that broke in this accident.

17. The Court erred in refusing to give to the jury the following instruction in writing, which instruction was requested by the defendant, Atlantic Coast Line Railroad Company;

Instruction No. 6. The Court instructs the jury that the Board that broke in this accident is not a safety appliance as contemplated by the Federal Safety Appliance Act.

18. The Court erred in refusing to give to the jury the following instruction in writing, which instruction was requested by the defendant, Atlantic Coast Line Railroad Company;

Instruction No. 7. The Court instructs the jury that Section 12, Title 45 o the U. S. Code provides that "The number, dimensions, location and manner of application of the appliances provided for by Sections 4 and 11 of this Title (Safety Appliances and Equipment) as designated by the Interstate Commerce Commission shall remain as standards of equipment to be used on all cars subject to the provisions of Sections one through 16 of this Title" and since the Interstate Commerce Commission has not designated or set forth any standard or rule relating to the board which broke in this accident, the Federal Safety Appliance Act is not applicable in this case.

Instruction No. 11. The Court instructs the jury that if you believe from the evidence that the car inspector of the defendant Atlantic Cost Line Railroad Company made such an inspection of the car in question as is customarily made by reasonably prudent persons inspecting cars for railroads that receive cars as intermediate or delivering carriers and that the defect in the board which broke was not discoverable or apparent to such an inspection then you cannot return a verdict against the defendant Atlantic Coast Line Railroad Company.

16. The Court erred in refusing to give to the jury the following instruction in writing, which instruction was requested by the defendant, Atlantic Coast Line Railroad Company;

Instruction No. 12. The Court instructs the jury that if you believe from the evidence that the car inspector of the defendant Atlantic Coast Line Railroad Company made such an inspection of the car in question as is customarily made by reasonably prudent persons inspecting cars for railroads that receive cars as intermediate or delivering carriers and that the defect in the board which broke was not discoverable or apparent to such an inspection then the defendant Atlantic Coast Line Railroad Company would not be guilty of any negligence in inspecting the car in question.

17. The Court erred in refusing to give to the jury the following instruction in writing, which instruction was requested by the defendant, Atlantic Coast Line Railroad Company:

19. The Court erred in refusing to give to the jury the following instruction in writing, which instruction was requested by the defendant, Atlantic Coast Line Railroad Company;

Instruction No. 8. The Court instructs the jury that Section 12, Title 45 of the U. S. Code provides that "The number, dimensions, location and manner of application of the appliances provided for by Sections 4 and 11 of this Title (Safety Appliances and Equipment) as designated by the Interstate Commerce Commission shall remain as standards of equipment to be used on all cars subject to the provisions of Sections 1—16 of this Title" and if you believe that the Interstate Commerce Commission has not set forth any standards relating to the board which broke in this accident then the Federal Safety Appliance Act has no application in this case.

20. The Court erred in refusing to give to the jury the following instruction in writing, which instruction was requested by the defendant, Atlantic Coast Line Railroad Company;

Instruction No. 9. The Court instructs the jury that it cannot return a verdict against the defendant, Atlantic Coast Line Railroad Company unless the plaintiff has reasonably satisfied the jury that said defendant Atlantic Coast Line Railroad Company of its agents or employees were guilty of negligence which proximately contributed to plaintiff's alleged injuries.

21. The Court erred in refusing to give to the jury the following instruction in writing, which instruction was requested by the defendant, Atlantic Coast Line Railroad Company;

Instruction No. 10. The Court instructs the jury that before you can return a verdict against the defendant, Atlantic Coast Line Railroad, you must be reasonably satisfied from the evidence that said depany conducted its business as a reasonably prudent would have done under the same circumstances or that said defendant did some act which a reasonably prudent person would not have done under the same circumstances and if you believe from the evidence that said defendant Atlantic Coast Line Railroad Company conducted its business as a reasonaly prudent person would have done under the same circumstances then you cannot return a verdict against the Atlantic Coast Line Railroad Company.

22. The Court erred in refusing to give to the jury the following instruction in writing, which instruction was requested by the defendant, Atlantic Coast Line Railroad Company;

Instruction No. 11. The Court instructs the jury that if you believe from the evidence that the car inspector of the defendant Atlantic Coast Line Railroad Company made such an inspection of the car in question as is customarily made by reasonably prudent persons inspecting cars for railroads that receive cars as intermediate or delivering carriers and that the defect in the board which broke was not discoverable or apparent to such an inspection then you cannot return a verdict against the defendant Atlantic Coast Line Railroad Cmpany.

23. The Court erred in refusing to give to the jury the following instruction in writing, which instruction

was requested by the defendant, Atlantic Coast Line Railroad Company;

Instruction No. 12. The Court instructs the jury that if you believe from the evidence that the car inspector of the defendant Atlantic Coast Line Railroad Company made such an inspection of the car in question as is customarily made by reasonably prudent persons inspecting cars for railroads that receive cars as intermediate or delivering carriers and that the defect in the board which broke was not discoverable or apparent to such an inspection then the defendant Atlantic Coast Line Railroad Company would not be guilty of any negligence in inspecting the car in question.

24. The Court erred in refusing to give to the jury the following instruction in writing, which instruction was requested by the defendant, Atlantic Coast Line Railroad Company;

Instruction No. 13. The Court instructs the jury that if it believes from the evidence in this case that the defect in the board that broke was a latent or hidden defect which was not discoverable by an inspection such as is customarily made by reasonably prudent car inspectors inspecting cars for delivering carriers in the railroad business then you cannot return a verdict against the defendant Atlantic Coast Line Railroad Company.

25. The Court erred in refusing to give to the jury the following instruction in writing, whch instruction was requested by the defendant, Atlantic Coast Line Railroad Company;

Instruction No. 13. The Court instructs the jury that if it believes from the evidence in this case that the defect in the board that broke was a latent or hidden defect which was not discoverable by an inspection such as is customarily made by reasonably prudent car inspectors inspecting cars for delivering carriers in the railroad business then you cannot return a verdict against the defendant Atlantic Coast Line Railroad Company.

18. The Court erred in refusing to give to the jury the following instruction in writing, which instruction was requested by the defendant, Atlantic Coast Line Railroad Company:

Instruction No. 14. The Court instructs the jury that regardless of the name by which the board that broke was called by railroad employees, the board did not come under the Federal Safety Appliance Act unless such was the intent of the Act.

19. The Court erred in refusing to give to the jury the following instruction in writing, which instruction was requested by the defendant, Atlantic Coast Line Railroad Company:

Instruction No. 15. The Court instructs the jury that if it believes from the evidence that the tank car in question was not in operation on defendant Atlantic Coast Line Railroad's line at the time of the accident, then the Federal Safety Appliance Act would have no application in this case.

20. The Court erred in refusing to give to the jury the following instruction in writing, which instruction

was requested by the defendant, Atlantic Coast Line Railroad Company:

Instruction No. 16. The Court instructs the jury that if it believes that the proximate cause of the plaintiff's alleged injury was the negligence of some other railroad or of the party furnishing the tank car to the shipper, such negligence cannot be imputed to the defendant Atlantic Coast Line Railroad Company and said defendant cannot be held chargeable with such other negligence.

21. The Court erred in refusing to give to the jury the following instruction in writing, which instruction was requested by the defendant, Atlantic Coast Line Railroad Company:

Instruction No. 17. The Court instructs the jury that the primary duty of furnishing a safe car to the shipper rests with the car service or initial carrier furnishing the car and the only duty resting on an intermediate carrier or delivering carrier is to give such a car an inspection as is customarily made by reasonably prudent inspectors inspecting cars for delivering carriers in the railroad business.

22. The Court erred in qualifying the written instructions requested by said defendant, Atlantic Coast Line Railroad Company, Number 1, which instruction was as follows:

Instruction No. 1. The Court instructs the jury that the defendant, Atlantic Coast Line Railroad Company, is not required to make a complete and thorough inspection in every detail of every freight car which

Whereas, the defendant Atlantic Coast Line Railroad Company, feeling aggrieved thereby has prosecuted its appeal to the United States Court of Appeals, Fifth Circuit; and

Whereas, the said W. A. Shields has cross appealed to the said United States Court of Appeals, Fifth Circuit;

Now, Therefore, we, W. A. Shields, as principal, and United States Fidelity and Guaranty Company, a corporation, as surety, are held and firmly bound unto O. D. Street, Jr., Clerk of the United States District Court, Middle District of Alabama, in the full and just sum of Two Hundred Fifty and n/100 ($250.00) Dollars to be paid to the said O. D. Street, Jr., his heirs, executors, administrators, successors or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators successors and assign, jointly and severally by these presents. Sealed with our seals and dated this 18th day of May, 1954.

Now, the conditon of the above obligation is such that if the said W. A. Shields shall prosecute said appeal to effect, and answer all costs if he fails to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

W. A. SHIELDS. (L.S.)
(W. A. Shields),
UNITED STATES FIDELITY
& GUARANTY COMPANY,
By PAUL B. FIELDS,
(Paul B. Fields),
Attorney in Fact.

(Seal)
Filed May 20, 1954.

it receives from other railroads as a deliveing carrier, but it can only be held for damages resulting from the breaking of a defective timber of a car which was discoverable by a reasonably careful inspection by a competent inspector of cars.

by qualifying this instruction and instructing the jury that said instruction was applicable only to Count II of plaintiff's complaint.

23. The Court erred in qualifying the written instruction requested by said defendant, Atlantic Coast Line Railroad Company, Number 3, which instruction is as follows:

Instruction No. 3. The Court instructs the jury that the defendant Atlantic Coast Line Railroad Company is not held to as high a degree of care in making the inspection of a car delivered to it as a delivering carrier or for a switching operation, as is the initial carrier or the carrier furnishing the car.

by qualifying this instruction and instructing the jury that said instruction was applicable only to Count II of plaintiff's complaint.

24. The Court erred in granting the motion of the defendant, Southern Railroad Company, to strike said Southern Railroad Company as a party defendant in this case.

25. The Court erred in granting the motion of the defendant Southern Railroad Company for a directed verdict.

ORDER EXTENDING THE TIME FOR FILING THE RECORD ON APPEAL AND DOCKETING THE APPEAL.

(Title Omitted.)

It is hereby ordered that the time for filing the record on Appeal and docketing the appeal in the above entitled case is hereby extended for an additional period of time up to and including ninety days from March 25, 1954, the date the notice of appeal was filed by the defendant, Atlantic Coast Line Railroad Company. This order is made in accordance with Section "g" of Rule 73.

Done this the 1st day of June, 1954.

C. B. KENNAMER,
United States District Judge.

Filed June 1, 1954.

STATEMENT OF POINTS.

(Title Omitted.)

To: Marion Rushton, Esquire, Attorney for Cross-Appellee, Southern Railway Company, Bell Building, Montgomery, Ala.; and Evans Hinson, Esquire, Attorney for Cross-Appellee, Atlantic Coast Line Railroad Company, S. Perry St., Montgomery, Ala.

Take notice that the following constitute the Statement of Points on which the Plaintiff as Appellant

26. The Court erred in dismissing the case as to the defendant Southern Railroad Company.

27. The Court erred in refusing to enter a judgment for the defendant Atlantic Coast Line Railroad Company notwithstanding the verdict.

28. The Court erred in refusing to grant said defendant a new trial.

Respectfully submitted,
EVANS HINSON,
D. N. HAMILTON,
Attorneys for the Defendant,
Atlantic Coast Line Railroad
Company.

Filed March 25, 1954.

SUPERSEDEAS BOND.

(Title Omitted.)

We, the undersigned, jointly and severally acknowledge that we and our personal representatives are jointly bound to pay to W. A. Shields, plaintiff, the sum of $12,000.00.

The condition of this bond is that whereas the defendant has appealed to the Court of Appeals of the Fifth Circuit from the judgment of this Court, entered February 26, 1954, and the Order of this Court overruling said defendant's motion, entered March 18, 1954, if this defendant shall pay the amount of the

final judgment herein if his appeal shall be dismissed or the judgment affirmed or modified together with all costs that may be awarded, this bond is void, otherwise to be and remain in full force and effect.

ATLANTIC COAST LINE RAILROAD COMPANY,
Defendant-Appellant.
By (S.) CHARLES COOK HOWELL,
Attorney-in-Fact.

(Seal)

UNITED STATES FIDELITY & GUARANTY COMPANY,
Surety.
By (S.) PAUL B. FIELDS,
(Paul B. Fields),
Attorney-in-Fact.

(Seal)

Approved this 25th day of March, 1954.
C. B. KENNAMER,
Judge.

Filed Mar. 25, 1954.

NOTICE OF APPEAL

In the District Court of the United States for the Middle District of Alabama, Northern Division.

W. A. Shields, Plaintiff,

vs. Civil #896-N.

Atlantic Coast Line Railroad Company, a corporation, and Southern Railway Company, a corporation, Defendants.

Notice is hereby given that W. A Shields, plaintiff above-named, hereby filed his appeal (cross-appeal) to the Circuit Court of Appeals for the Fifth Circuit from that part of the Final Judgement entered in this action on the 26th day of February, 1954, whereby at the conclusion of all of the evidence the Court announced that it granted the motion of defendant Southern Railway Company, a corporation, that a verdict be directed in its favor, whereupon the Court instructed the jury that it could not return a verdict in favor of the plaintiff against the defendant Southern Railway Company, a corporation and from that part of said Final Judgment whereby it was decreed and adjudged that plaintiff have and take nothing by this suit against Southern Railway Cmpany, a corporation.

Done this 12th day of April, 1954.

JOHN C. GODBOLD,
TRUMAN HOBBS,
ALBERT W. COPELAND,
Attorneys for Appellant
(Cross Appellant).

Of Counsel:
GODBOLD & HOBBS,
306-311 Professional Center,
Montgomery, Alabama.

Certificate.

I certify that I have this date mailed a copy of the foregoing Notice of Appeal, postage prepaid, to Marion Rushton, Esq., Montgomery, Alabama, Attorney for defendant Southern Railway Company, a corporation, and to Evans Hinson, Esq., Montgomery, Alabama, Attorney for defendant Atlantic Coast Line Railroad Company, a corporation.

JOHN C. GODBOLD,
Attorney for Appellant
(Cross-Appellant).

Filed April 12, 1954.

ORDER EXTENDING THE TIME FOR FILING THE RECORD ON APPEAL AND DOCKETING THE APPEAL.

(Title Omitted.)

It is hereby ordered that the time for filing the record on appeal and docketing the appeal in the above entitled case is hereby extended for an additional thirty (30) days from the expiration of the forty (40) days period. This Order is made in accordance with Section "g" of Rule 73.

Done this the 29th day of April, 1954.

C. B. KENNAMER,
Judge, U. S. District Court.

Filed April 29, 1954.

DESIGNATION OF CONTENTS OF RECORD ON APPEAL.

(Title Omitted.)

Filed Apr. 30, 1954.

It is agreed by the parties that the record on appeal shall consist of,

1. Plaintiff's original complaint.

2. Plaintiff's amended complaint.

3. Plaintiff's amendment to complaint as amended.

4. Defendant Atlantic Coast Line Railroad's motion to strike or dismiss.

5. Order overruling defendant Atlantic Coast Line Railroad's motion to strike and dismiss.

6. Defendant Southern Railway Company's motion to dismiss.

7. Order overruling Southern Railway Company's motion to dismiss.

8. Defendant Atlantic Coast Line Railroad Company's answer to plaintiff's amended complaint.

9. Defendant Southern Railway Company's answer to plaintiff's amended complaint.

10. Motion for summary judgment of Southern Railway Company with affidavits of Elmore A. Evers, John B. Hyde and J. B. Griffis.

11. Oral testimony of Elmore A. Evers on motion for summary judgment of Southern Railway Company.

12. Exhibits, which will be later enumerated and designated, offered at hearing on motion for summary judgment of Southern Railway Company.

13. Order overruling defendant Southern Railway Company's motion for summary judgment.

14. Interrogatories to defendant Southern Railroad Company.

15. Answers of Southern Railroad Company to plaintiff's interrogatories.

16. Interrogatories to defendant Atlantic Coast Line Railroad Company.

17. Answers of defendant Atlantic Coast Line Railroad Company to plaintiff's interrogatories.

18. Interrogatories to plaintiff by defendant Atlantic Coast Line Railroad Company.

19. Answers of plaintiff to defendant Atlantic Coast Line Railroad's interrogatories.

20. All of the oral testimony of witnesses testifying at the trial of the case except the testimony of

Dr. Elias N. Kaiser, Dr. E. J. Cocour, Dr. William L. Smith and Dr. Jackson L. Bostwick. The stipulation as to the movement of the tank car. Record shall include notation of argument on motions and objections to Court's oral charge and refused charges.

21. Original papers and exhibits ordered sent to the Court of Appeals by the District Court under Rule 75, Section (i) as follows:

a. Plaintiff's exhibit 1—photographs of tank car.

b. Plaintiff's exhibit 2—photographs of tank car.

c. Plaintiff's exhibit 5—Four (4) small photographs of tank car.

d. Plaintiff's exhibit 7—Repair Order of tank car.

e. Plaintiff's exhibit 10—Instruction for movement of empty car.

f. Plaintiff's exhibit 11—Extract from rule book of Southern Railway Company.

g. Plaintiff's exhibit 11a—Time table of Southern Railway Company.

h. Plaintiff's exhibit 14—Invoice.

i. Plaintiff's exhibit 15—Original bill of lading.

j. Defendant Southern Railway Company's exhibit No. 1—Annual report of Southern Railway Company.

k. Defendant Southern Railway Company's exhibit No. 2—Annual report of New Orleans & Northeastern Railroad.

l. Defendant Southern Railway Company's exhibit No. 3—Annual report of Southern Railway Company.

m. Defendant Southern Railway Company's exhibit No. 4—Annual report of New Orleans & Northeastern Railroad.

22. Defendant Atlantic Coast Line Railroad Company's motion for directed verdict at the close of all evidence and order denying same.

22½. Defendant, Southern Railway Company's motion for directed verdict and order thereon.

23. Court's oral charge to the jury.

24. Written charges requested by defendant Atlantic Coast Line Railroad Company and refused.

25. Written charges requested by defendant Atlantic Coast Line Railroad Company and given.

26. Final Judgment.

27. Defendant Atlantic Coast Line Railroad Company's motion for judgment notwithstanding the verdict or in the alternative motion for a new trial.

28. Order denying Atlantic Coast Line Railroad Company's motion for judgment notwithstanding the verdict and motion for new trial.

29. Notice of appeal.

30. Statement of points on appeal.

31. This designation.

32. Journal entries.

EVANS HINSON,
Attorney for Defendant-Appellant, Atantic Coast Line Railroad Company.
(See following sheet.)
Attorney for Defendant-Appellant, Southern Railway Company.
JOHN C. GODBOLD,
Attorney for Plaintiff-Appellee.

Southern Railway Company has filed in the United States Circuit Court of Appeals for the Fifth Circuit motions to docket and dismiss as to it the appeal of the Atlantic Coast Line Railroad Company, and the appeal (cross appeal) of W. A. Shields, and pursuant to Rule 75 (J) has already requested the certification and transmission of that portion of the record necessary to support said motions to dismiss said appeals. Southern Railway Company does agree that in the event either or both of its said

motions to dismiss are denied, that it then agrees to the foregoing designation of contents of the record on appeal.

MARION RUSHTON,
EDGAR A. STEWART,
Attorneys for Defendant-Appellee Southern Railway Company.

ORDER OF COURT FOR ORIGINAL PAPERS AND EXHIBITS TO BE SENT TO U. S. COURT OF APPEALS UNDER RULE 75, SECTION "i".

(Title Omitted.)

The Court is of the opinion that the following original papers and exhibits offered in evidence in the above case should be sent to the U. S. Court of Appeasl, Fifth Circuit, in lieu of copies,

It Is, Therefore, Ordered that the following exhibits and original papers be sent to the U. S. Court of Appeals, Fifth Circuit, in the same manner as the remainder of the record in this case.

a. Plaintiff's exhibit 1—Photographs of tank car.

b. Plaintiff's exhibit 2—Photographs of tank car.

c. Plaintiff's exhibit 5—Four (4) small photographs of tank car.

d. Plaintiff's exhibit 7—Repair Order of tank car.

e. Plaintiff's exhibit 10—Instruction for movement of empty car.

f. Plaintiff's exhibit 11—Extract from rule book of Southern Railway Company.

g. Plaintiff's exhibit 11a—Time table of Southern Railway Company.

h. Plaintiff's exhibit 14—Invoice.

i. Plaintiff's exhibit 15—Original bill of lading.

j. Defendant Southern Railway Company's exhibit No. 1—Annual report of Southern Railway Company.

k. Defendant Southern Railway Company's exhibit No. 2—Annual report of New Orleans & Northeastern Railroad.

l. Defendant Southern Railway Company's exhibit No. 3—Annual report of Southern Railway Company.

m. Defendant Southern Railway Company's exhibit No. 4—Annual report of New Orleans & Northeastern Railroad.

C. B. KENNAMER.
Judge.

Filed May 17, 1954.

CERTIFICATE OF COURT'S MINUTES.

(Title Omitted.)

This is to certify that attorneys for the plaintiff and attorneys for the defendant, Atlantic Coast Line Railroad Company argued orally and presented briefs to the Court on the question of Atlantic Coast Line's motion for directed verdict and argued orally and presented briefs on the question as to whether the Federal Safety Appliance Act is applicable in this case, citing and arguing authorities and statutes including "Code of Federal Regulations, Title 49—Transportation". Arguments of counsel, briefs and citations were considered by this Court in ruling upon the question as to whether the Federal Safety Appliance Act was applicable in this case including Court's ruling on defendant, Atlantic Coast Line's requested written charges.

C. B. KENNAMER,
Judge.

Filed May 17, 1954.

AMENDED DESIGNATION OF CONTENTS OF RECORD ON APPEAL.

(Title Omitted.)

Comes the defendant, Atlantic Coast Line Railroad Company and designates the additional por-

tions of the proceedings to be included in the record on appeal in this case:

33. Order of Court for Original Papers and Exhibits to be sent to U. S. Court of Appeals under Rule 75, Section "i".

34. Certificate of Court's Minutes.

35. This amended Designation.

EVANS HINSON,
Attorney for Defendant
Atlantic Coast Line Railroad Company.

This is to certify that I have mailed a copy of this designation to Honorable John Godbold, attorney for the plaintiff and Hon. Edgar Stuart, attorney for Southern Railroad Company together with copy of the papers referred to therein.

EVANS HINSON,
Attorney for Defendant
Atlantic Coast Line Railroad Company.

Filed May 17, 1954.

(Title Omitted.)

Whereas, a judgment was entered in the above styled action on the 27th day of February, 1954, in the United States District Court for the Middle District of Alabama, for the plaintiff W. A. Shields and against the defendant Atlantic Coast Line Railroad Company; and

about the business which the subsidiary was incorporated to, and does, actively own and operate.

The judgment is affirmed as to the Southern Railway Company. It is reversed and remanded as to the Atlantic Coast Line for further and not inconsistent proceedings.

IN UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15193

ATLANTIC COAST LINE RAILROAD COMPANY

versus

W. A. SHIELDS and SOUTHERN RAILWAY COMPANY,

and

W. A. SHIELDS

versus

SOUTHERN RAILWAY COMPANY

MINUTE ENTRY OF JUDGMENT—March 17, 1955

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed as to Southern Railway Company; and that said judgment be, and it is hereby, reversed as to the Atlantic Coast Line and remanded to the said District Court for further and not inconsistent proceedings;

It is further ordered and adjudged that the appellee and appellant, W. A. Shields, and the surety on the appeal bond herein, United States Fidelity & Guaranty Company, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

Clerk's Certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1955.

No. 150

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed October 10, 1955

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary calendar. The Court calls this case to the attention of the Interstate Commerce Commission and expresses its readiness to accept any brief it might wish to submit.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(Cross-Appellant) intends to rely on his cross-appeal:

1. The Court erred in granting the motion of defendant Southern Railway Company that a verdict be directed in its favor.

2. The Court erred in instructing the jury that it could not return a verdict in favor of the plaintiff against the defendant Southern Railway Company.

3. The Court erred in entering a final judgment decreeing and adjudging that plaintiff have and take nothing by this suit against defendant Southern Railway Company.

Of Counsel:
GODBOLD & HOBBS,
Professional Center Bldg.,
Montgomery, Ala.

JOHN GODBOLD,
Attorney for Plaintiff as Appellant (Cross-Appellant).

Certificate.

I hereby certify that I have served a copy of the foregoing Statement of Points on Marion Rushton, Esq., Attorney for Southern Railway Company, Bell Building, Montgomery, Ala., and on Evans Hinson, Esq., S. Perry St., Montgomery, Ala. this the 19th day of June, 1954, be depositing same in the U. S. Mails.

JOHN GODBOLD,
Attorney for Plaintiff as Appellant (Cross-Appellant).

Filed June 19, 1954.

Filed June 19, 1954, O. D. Street, Jr., Clerk. By Annie Schoolar, Deputy Clerk.

(Title Omitted.)

It appearing to the Court that defendant Atlantic Coast Line Railroad Company has filed an appeal in this cause to the United States Court of Appeals for the Fifth Circuit, and that plaintiff has filed a cross-appeal, and the defendant Southern Railway Company has filed a motion to docket and dismiss said cross-appeal;

And, it further appearing that said United States Court of Appeals has directed that the motion to dismiss be heard at the same time as the appeal is heard on its merits;

And, it further appearing that certain documents and exhibits have not been included in the record on appeal because of the pendency of the motion to dismiss the cross-appeal, which it now appears are necessary to make the record full and complete in the event said motion to dismiss the cross-appeal is denied, and that because of the pendency of said motion plaintiff, as cross-appellant, has filed no Statement of Points until this date,

It Is, Therefore, Ordered and decreed that the following be included in the record in this cause:

Statement of Points of Plaintiff as Cross-Appellant and that the following documents and exhibits in

evidence in this cause be included in the record and the originals thereof forwarded to the United States Court of Appeals in lieu of copies:

Plaintiff's Exhibits to testimony of Elmore A. Evers.

(re-introduced at trial, Transcript of Testimony p. 73, 109):

#2—Pass on Southern Railway System (Photostat substituted for original.)

#3—Map of Southern Railway System.

#4—Merchandise Car Directory.

#5—Coal and Coke Directory.

#7—Stationery of Southern Railway System used in Montgomery office.

#8—Miscellaneous Forms used in Montgomery office.

#9—Southern Railway System form, "Employees' Application for Free or Reduced Rate Transportation."

#10—Southern Railway System Form for Presentation of Loss and Damage Claims.

#11—Southern Railway System form, "Application for Refund of Unused Ticket Value."

Done this the 19th day of June, 1954.

C. B. KENNAMER,
Judge.

Filed June 19, 1954.

In the United States Court of Appeals for the Fifth Circuit.

No.....

Atlantic Coast Line Railroad Company, Appellant,
versus
W. A. Shields, Et Al., Appellees.
and
W. A. Shields, Appellant,
versus
Southern Railway Company, Et Al., Appellees.

Appeals from the United States District Court for the Middle District of Alabama.

For Cause Shown, It Is Ordered that the time for filing the transcript of record in this Court in the above entitled cause be extended until July 21st, 1954.

(S.) WAYNE G. BORAH,
U. S. Circuit Judge for the Court.

June 22, 1954.

CERTIFICATE.

United States of America,
Middle District of Alabama.

I, O. D. Street, Jr., Clerk of the United States District Court, Middle District of Alabama, do hereby certify that the foregoing pages numbered One to Three Hundred Five, both inclusive, contain a full, complete, true and perfect transcript of the proceedings on appeal in the case of W. A. Shields, Plaintiff, versus Atlantic Coast Line Railroad Company, a Corporation, and Southern Railway Company, a Corporation, Defendants, Civil Action No. 896-N of the Docket of said Court.

Witness my hand and the seal of said Court at the City of Montgomery, Alabama, on this the 12th day of July, 1954.

O. D. STREET, JR.,
Clerk, United States District Court, Middle District of Alabama.

(Seal)

[Folios 341-343 omitted in printing]

In United States Court of Appeals for the Fifth Circuit

Minute Entry of Argument and Submission—February 8, 1955 (omitted in printing)

[File endorsement omitted]

In the United States Court of Appeals for the Fifth Circuit

No. 15193

Atlantic Coast Line Railroad Company, Appellant

versus

W. A. Shields and Southern Railway Company, Appellees

and

No. 15072

W. A. Shields, Appellant,

versus

Atlantic Coast Line Railroad Company and Southern Railway Company, Appellees

Appeals from the United States District Court for the Middle District of Alabama

Opinion—March 17, 1955

Before Hutcheson, Chief Judge, Holmes, Circuit Judge, and Dawkins, District Judge

Hutcheson, Chief Judge: This is another case like *O'Donnell* v. *Elgin*, 338 U.S. 384, *Carter* v. *Atlanta*, 338 U.S. 430, and *Affolder* v. *New York, Chicago & St. Louis*, 339 U.S. 596, in which a claimant, for injury resulting from defects in a railroad car, invokes both the absolute liability imposed by the Safety Appliances Act, 45 U.S.C., Sees. 1 to 46, and the qualified liability arising out of negligence. In those cases it was negligence under the

Federal Employers Liability Act, 45 U.S.C., Secs. 51 to 60. Here it is negligence at common law.

In those cases, particularly in the O'Donnell case the Supreme Court points to the wide spread confusion attending the anomalous procedure employed in prosecuting such claims.[1] The same difficulties have made themselves felt here with the result that on the appeal of the Atlantic Coast Line Railroad Company, the judgment must be reversed and the cause remanded.

The matter stands differently, however, on the appeal of plaintiff from the judgment upon a directed verdict as to the Southern Railway Company. For the reasons hereafter stated, as to it this judgment must be affirmed.

Brought against the Atlantic Coast Line Railroad Company, as the delivering, the Southern Railway Company, as the originating, carrier, the suit was for damages for personal injuries received by plaintiff, an independent contractor and invitee, as the result of the breaking when he stepped upon it of a dome step on a tank car which he had been engaged to unload.

Complying with the admonition of the court in the O'Donnell case, *supra*, the complaint was in two counts. Count One charged that the dome step was a safety ap-

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[1] "Notwithstanding this court's efforts to distinguish the safety appliance violation case from the common law negligence case, confusion of the two persists, in part, at least due to the anomalous procedure by which such claims are litigated. * * * The appliance cause often is joined with one for negligence, and even sometimes, as here, mingled in a single mongrel cause of action. In addition, at trial, certain issues such as causation and extent of injury, for example, are common to both causes of action. * * *"

"* * * Pleadings will serve the purpose of sharpening and limiting the issues only if claims based on negligence are set forth separately from those based on violation of the appliance acts.

"But no matter how the pleadings are allowed to stand, we think it is almost indispensable to an intelligible charge to the jury that a clear separation of the two kinds of actions be observed and impressed. * * *" O'Donnell v. Elgin, 338 U.S. 384.

pliance, and that its breaking was a violation of the Appliances Act. Count Two charged that the defendants negligently furnished and tendered, for the unloading of the gasoline therein, a defective tank car.

In addition to a general denial, the Atlantic Coast Line alleged as to the first count, (1) that the dome step was not a safety appliance within the meaning of the act, and (2) that if it was, plaintiff, not being a railroad employee, was not entitled to the benefits of the act.

As to the second count, the charge of common law negligence, it alleged: that the board which gave way had been newly painted; that the defect in it was not a patent but a hidden defect, which could not have been discovered by the use of ordinary care; and that the Atlantic Coast Line, as a delivering carrier, was not as matter of law, and could not be found guilty of negligence in handling the car.

The Southern Railway alleged: that the Alabama Statute of Limitations of One Year had barred the cause of action as to it, and (2) that it was not the originating carrier, and it had never had the car in its possession.

On the issues thus joined, the cause was tried to a jury on evidence which included uncontradicted evidence: that the New Orleans and Northeastern Railroad Company was the initial carrier of the car; that the Southern Railway Company had at no time had anything to do with its handling; and that, though the stock of the New Orleans and Northeastern Railroad Company was solely owned by it, Southern Railway Company was an absolutely separate corporation; that it did not operate its subsidiary; and that it had never handled the car.

The district judge, therefore, instructed a verdict for the Southern Railway and submitted the cause to the jury as to the Atlantic Coast Line on both counts and on a general charge.

There followed a general verdict and judgment for $750.00 against Atlantic Coast Line from which that defendant has appealed, while plaintiff has appealed from the judgment in favor of the Southern Railway Company.

Here the Atlantic Coast Line insists that it should have had an instructed verdict on both counts, and that the judgment must be reversed and rendered for it. As to the first count, it claims: (1) that the dome step or platform

was not a safety appliance; and (2) that if it was, plaintiff may not invoke the benefit of the act. As to the second count, its claim is that the evidence establishes as matter of law: that the defect in the board was not patent but latent; and that defendant had made the usual careful inspection of the car and the defect complained of was not discoverable upon such an inspection.

In the alternative, it urges upon us that if it was not entitled to an instructed verdict throughout, it was certainly entitled to an instruction as to Count One, and, finally, that if it was not entitled to an instructed verdict at all, there were errors in the charge and in the refusal of its requested instructions which require a reversal.[2]

We find ourselves in complete agreement with the position taken and the reasons given for that position in the appellant's brief with respect to the first count. This is that when a railroad company has complied with the regulations prescribed by the Interstate Commerce Commission, pursuant to the authority delegated to it in 45 U.S.C.A., Sec. 11, et seq., it "* * * has discharged its full duty so far as the ladder [or any other safety device] requirement of the Safety Appliances Act is con-

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[2] Since the error will not again occur, in view of the fact that the safety appliance count has been eliminated, it is sufficient at this time to say that in charging the issues raised by the two counts, the court did not follow the admonition of the Supreme Court in the O'Donnell case to keep the issues of the two counts completely separate and distinct. On more than one occasion he charged in a way which made it extremely difficult if not impossible for the jury to avoid confusion, if not bewilderment, in respect to the completely different concepts of absolute liability under count one, if the step was unsafe, and conditional liability under the second count, only if its unsafety was the result of negligence.

Further, while the district judge, in the general charge, did endeavor to correctly present the defense which defendants put forward in their special charges numbered 9 to 13, inclusive, we are of the opinion that he did so skimpingly, if at all, and that this failure should be remedied on another trial.

cerned. The judgment of the trial court and jury cannot be substituted for that of the Commission." *A. T. & S. F. RR. Co. vs: Scarlet*, 300 U.S., 471; *Apache Ry. v. Shumway*, 158 Pac(2) 142.

We agree with the appellant that the dome step is not, within the classification of the I.C.C., a running board, and that, in assuming, without any basis in law for the assumption, that it was a safety appliance, the court erred. He did correctly declare in his charge: that whether it was or was not a safety appliance was to be determined as matter of law; and that he did not and would not consider the testimony of any of the witnesses as to whether it was or was not. Without, however, any basis in the statute or in any order or regulation of the Commission for so holding, he did determine as matter of law that it was a safety appliance. So determining, he advised the jury that it was not for it to determine whether it was or was not such, but only whether it was safe, and thus imposed upon the defendant, as to the dome step, the absolute obligation imposed by the statute only with respect to safety appliances. In doing this, he erred.

As appellant correctly points out in the discussion in its brief, a chaotic condition would be produced if the question of compliance with the Safety Appliances Act and the specifications governing the number, location, dimension and manner of appliances should be left to the varying notions of judges or the inexperienced laymen who comprise petit juries. For it is not every device with which a car might be equipped which comes under, and is governed by, the Safety Appliances Act or the regulations adopted by the Interstate Commerce Commission pursuant thereto. Only those are safety appliances which are officially determined by law or regulation to be such. *Central Vermont Railroad v. Perry*, 10 F(2) 132; *Fleming v. Richardson*, 24 NW(2) 280; *James C. Davis v. Maury*, 266 U.S. 401; *Hill v. Minneapolis*, 200 NW 485.

Nowhere in the regulations adopted by the Interstate Commerce Commission relating to tank cars, as set forth in Secs. 131.8 and 131.9, Title 49 (Transportation) Code of Federal Regulations, or elsewhere, will there be found

any reference to a dome step board, by whatever name that device might be labeled.

By its very failure to prescribe any regulation governing such a device, the Interstate Commerce Commission has demonstrated its administrative determination that dome step boards do not fall within the scope of the Act.

A verdict should have been instructed on the first count.

In view of our agreement with appellant that the step is not a safety appliance, it is unnecessary for us to consider and decide whether defendant is right in its second position, that plaintiff, not being a railroad worker, is not entitled to the protection of the Act. It is sufficient to refer to cases pro and con. *Patton v. Baltimore*, 197 Fed. 732; *Reisberg* v. *Duluth*, 47 NW(2) 113; *Fairport v. Meredith*, 292 U.S. 598; *Brady v. Terminal*, 303 U.S. 10; *Jacob* v. *Ill.*, 63 So. 306.

As to the second count, we agree with Atlantic's view that if the defect in the board was not discoverable in the exercise of reasonable care, it could not, as delivering carrier, be held negligent for not discovering the undiscoverable.

We cannot agree with it, though, that the evidence established as matter of law that, in the exercise of due care, the defect was undiscoverable. On the contrary, we think there was sufficient evidence to take the second count to the jury.

Because, however, of the submission of the two counts for a general verdict,[3] and because of the errors in the giving and refusal of charges, the judgment may not be affirmed as to Atlantic on the second count.

As to plaintiff's appeal from the judgment for Southern Railway, Southern meets it first with a motion to dismiss because the appeal was not timely. The point made

---

[3] The court charged the jury: "You must determine, Gentlemen, whether the plaintiff is entitled to recover under either theory of this complaint. It is not necessary for you to designate in your findings which theory you predicate your findings under, if you find that the plaintiff is entitled to recover under either theory of this case."

is that, instead of being taken within the time limited from the entry of the judgment in Southern's favor, it was not taken until after the motion of Atlantic for a judgment notwithstanding the verdict and, in the alternative, for a new trial, had been acted upon.

Without laboring the matter by a discussion of them, it is sufficient to say that, under the cases cited by appellant, *Continental v. U.S.*, 167 F(2) 107, a case from this court of *Zimmern v. U.S.*, 298 U.S. 167, and the case of *Leishman v. Associated*, 318 U.S. 203, the point is not well taken. The appeal was timely. It may not be dismissed.

On the merits, however, we agree with Southern that, under the undisputed facts, Southern was not the alter ego of the N.O. and N.E. Railway Company; that it was not, and could not be, sued as the original carrier; and that the district judge was right in instructing a verdict in its favor.

No useful purpose will be served by setting out in detail the evidence on which this conclusion is based. It suffices to say that while Southern, as the holding company, has the same general executive officers as its subsidiary, the other employees are not the same. The Southern Railway, as such, does not run or operate the N.O. & N.E. Railway Company, and it had nothing to do with the handling of the car in question, as originating carrier or otherwise. A consideration of the cases on which appellant relies for his different view shows that they do not, as applied to the facts of this case, at all support it. This is particularly so with respect to the case on which he mainly relies, *Southern Railway v. Crosley*, 201 F(2d) 878, in which the facts were wholly different.

Without setting out the facts of this case, it is sufficient to say that, to hold under them that the Southern Railway Company may be sued as the operator of the N. O. and N.E. Railroad Company, and, therefore, the originating carrier, would require a holding in substance that a holding company is responsible simply, because it is a holding company, as the actor in the routine, the ordinary, activities of its wholly owned subsidiary in and

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954

No. 150

W. A. SHIELDS,
Petitioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

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ATLANTIC COAST LINE RAILROAD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on March 17, 1955.

OPINIONS BELOW.

The judgment of the District Court (R. 297-298) is unreported. The opinion of the Circuit Court of Appeals (R. 345-354) is reported in 220 F. 2d 242.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered March 17, 1955 (R. 345). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTION PRESENTED.

Are railroads relieved of the obligation imposed by 45 U. S. C., Section 11 to keep a designated appliance "secure" by reason of the fact that the Interstate Commerce Commission has not adopted a regulation standardizing and making uniform such an appliance.

STATUTES INVOLVED.

The pertinent statutory provisions (45 U. S. C., Sections 11 and 12) are printed in Appendix A and B.

STATEMENT.

On May 6, 1952, petitioner, an independent contractor, was instructed by the consignee of a tank car of gasoline to unload the tank car which had been placed on a siding in the freight yards of Atlantic Coast Line Railroad Company in Montgomery, Alabama (R. 24, 25, 117, 118, 130, 131). The car, SHPX 21336, like most tank cars, was to be unloaded from the bottom of the car (R. 129), but in order for the gasoline to flow out it is necesary for the dome cap on the top of the car to be removed and a valve inside the dome opened (R. 130). Petitioner climbed to the top of the car to take off the dome cap and open the valve. He stepped on the running board which runs along the side of the tank near the top thereof. It broke and caused him to fall to the tracks below (R. 132), inflicting painful and permanent injury to the vertebrae in his back. It is without dispute that the running board was not secure since it broke when petitioner stood on it, and was knotty, cracked and so rotten and crumbly that it could be mashed in one's hand.

As last amended the complaint stated a cause in two counts against Atlantic Coast Line Railroad Company as delivering carrier and Southern Railway Company as

originating carrier. A verdict was directed for Southern, which action was affirmed on appeal; Southern does not enter into the question presented by this petition and no further reference will be made to it.

One of the counts against Atlantic was based on a violation of the Safety Appliance Act in failing to maintain a "secure running board" as required by the Act (45 U. S. C., Section 11). The other count against Atlantic was based on negligence. During the trial the defective board was referred to as a running board, top running board, dome step board, short running board, and dome running board. In its opinion the Court of Appeals referred to it as a "dome step board", a title urged by Atlantic almost as an afterthought, for at the trial it was called a "running board" by witnesses for both sides who were experienced railroad men (R. 180, 194, 259). In Atlantic's answers to interrogatories its superintendent referred to it seven times as a "running board" (R. 24-30). Atlantic's repair records on the defective car called it a "running board" (Plaintiff's Exhibit 7). Counsel for Atlantic referred to it as such at the trial (R. 259, 260). The running board is used in loading and unloading the tank (R. 219), a fact which is common knowledge in the railroad business (R. 248). At times the running board is used by the train crew (R. 179).

The Trial Court charged the jury that the running board in question was covered by the Safety Appliance Act and that it was for the jury to determine whether the running board was secure (R. 274, 276, 277, 284). The Trial Court also charged the jury on the law as to the negligence count (R. 278). The jury returned a general verdict for petitioner against Atlantic for $7,500 (R. 297).

It was Atlantic's theory throughout the trial and on appeal that the defective running board was not a safety appliance because the Interstate Commerce Commission

standardization regulations relating to tank cars (Sections 131.8 and 131.9, Title 49, Code of Federal Regulations) did not cover this running board.

Atlantic appealed and the Circuit Court of Appeals reversed. On appeal the Court adopted as the basis of its decision the argument of Atlantic that since the ICC had not made an order standardizing the running board in question as to "number, dimension, location, and manner of application" under the authority granted it in 45 U. S. C., Section 12, the board was not a running board within the Safety Appliance Act. The Court stated:

> "By its very failure to prescribe any regulation governing such a device, the Interstate Commerce Commission has demonstrated its administrative determination that dome step boards do not fall within the scope of the Act" (R. 351).

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

1. In holding that the Interstate Commerce Commission by promulgating a regulation standardizing the number, dimensions, location and manner of application of some running boards on tank cars has made an administrative determination that no other running board on a tank car can fall within the scope of the Safety Appliance Act.

2. In holding that once the Interstate Commerce Commission has promulgated a regulation standardizing the number, dimensions, location and manner of application of some running boards on tank cars, such regulation operates to define conclusively what is and what is not a running board on a tank car within the protection of the Safety Appliance Act.

3. In holding that the fact that the Interstate Commerce Commission has not set by regulation the number, dimen-

sion, location, and manner of application of running boards such as the one in suit, constitutes an administrative determination binding on the Courts and injured persons that such running boards were not intended by Congress to be covered by the Safety Appliance Act.

4. In reversing the District Court.

REASONS FOR GRANTING THE WRIT.

1. This case involves the safety and rights of railroad employees and those members of the general public who in the course of their daily activities must work on and around railroad equipment. Congress, by the Safety Appliance Act, has imposed a rule of absolute liability on railroads for the protection of those injured as the proximate result of named appliances that are defective. Congress has declared that sill steps, hand brakes, running board ladders and grab irons are of such importance to persons using them that a failure to maintain them in a safe condition subjects a railroad to absolute civil liability in case of injury or a statutory fine even if there is no injury.

In addition to the Congressional declaration that such appliances be maintained in a safe condition, the Act vests in the ICC the authority to standardize and make uniform such appliances. Certain railroad cars have appliances named in the Act which have not been standarized under ICC regulations. Petitioner in this case was injured as a proximate result of such a defective appliance.

This Court has many times declared the Congressional intent expressed in the Safety Appliance Act to be to protect users of the appliances named therein. It is of vital importance that there be a determination of whether the protection of the Act against unsafe appliances is limited by the exercise of the ICC of its rule-making power under Section 12.

at all, there were errors in the charge and in the refusal of its requested instructions which require a reversal.[2]

We fnid ourselves in complete agreement with the position taken and the reasons given for that position in the appellant's brief with respect to the first count. This is that when a railroad company has complied with the regulations prescribed by the Interstate Commerce Commission, pursuant to the authority delegated to it in 45 U.S.C.A., Sec. 11, et seq., it "* * *has discharged its full duty so far as the ladder (or any other safety device) requirement of the Safety Appliances Act is concerned. The judgment of the trial court and jury cannot be submitted for that of the Commission." *A.T.& S.F. RR. Co. vs. Scarlet,* 300 U.S., 471; *Apache Ry. v. Shumway,* 158 Pac(2) 142.

We agree with the appellant that the dome step is not, within the classification of the I.C.C., a running board, and that, in assuming, without any basis in law for the assumption, that it was a safety appliance, the court erred. He did correctly declare in his charge: that whether it was or was not a safety appliance was to be determined as matter of law; and that he did not and would not consider the testimony of any of the witnesses as to whether it was or was not. Without, however, any basis in the statute or in any order or regulation of the Commission for so holding, he did determine as matter of law that it was a safety appliance. So determining, he advised the jury that it was not for it to determine whether it was or was not such,

2.- Since the error will not again occur, in view of the fact that the safety appliance count has been eliminated, it is sufficient at this time to say that in charging the issues raised by the two counts, the court did not follow the admonition of the Supreme Court in the O'Donnell case to keep the issues of the two counts completely separate a distinct. On more than one occasion he charged in a way which made it extremely difficult if not impossible for the jury to avoid confusion, if not bewilderment, in respect to the completely different concepts of absolute liability under count on, if th step was unsafe, and conditional liability under the second count, only if its unsafety was the result of negligence.

Further, while the district judge, in the general charge, did endeavor to correctly present the defense which defendants put forward in their special charges numbered 9 to 13, nclusive, we are of the opinion that he did so skimpingly, if at all; and that this failure should be remedied on another trial.

The problem exists today, as shown by the present case. It will constantly recur because as railroad cars are redesigned and changed by the railroad industry resulting changes in appliances on such cars will not at once be reflected in ICC regulations. The effect of the decision of the Court of Appeals is to limit the protection of the class of persons sought to be protected by the Act to the extent to which the ICC has promulgated regulations. Those whom Congress intended to protect should not be given so tenuous a margin of safety.

2. The Court below decided that because the ICC in its regulations covering tank cars (Sections 131.8 and 131.9 Title 49, Code of Federal Regulations) did not promulgate any regulations governing the running board in question, the running board could not be a safety appliance within the scope of the Safety Appliance Act. The Court decided in effect that Congress in granting the ICC under Section 12 of the Act authority to standardize by regulation the number, dimensions, location and manner of application of appliances also vested in the ICC exclusive authority to determine which safety appliances should be within the protection of the Act. Such a construction is clearly contrary to the congressional intent and pre-empts any field of operation for Section 11 of the Act.

Section 11 (Appendix A) provides in part that "all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards . . ." Section 12 of the Act (Appendix B) gives the ICC authority to fix by regulation "The number, dimensions, location, and manner of application of the appliances provided by Sections 4 and 11 of this title . . ." The Court below decided that even though Congress in Section 11 declared that all running boards must be secure, an insecure running board was not within the Act if it had not been standarized by the ICC under the standardization authority conferred by Section 12.

but only whether it was safe, and thus imposed upon the defendant, as to the dome step, the absolute obligation imposed by the statute only with respect to safety appliances. In doing this, he erred.

As appellant correctly points out in the discussion in its brief, a chaotic condition would be produced if the question of compliance with the Safety Appliances Act and the specifications governing the number, location, dimension and manner of appliances should be left to the varying notions of judges or the inexperienced laymen who comprise petit juries. For it is not every device with which a car might b equipped which comes under, and is governed by, the Safety Appliances Act or the regulations adopted by the Interstate Commerce Commission pursuant thereto. Only those are safety appliances which are officially determined by law or regulation to be such. *Central Vermont Roalroad v. Perry,* 10 F(2) 132; *Fleming v. Richardson,* 24 NW(2) 280; *James C. Davis v. Manry,* 266 U.S. 401; *Hill v. Minneapolis,* 200 NW 485.

Nowhere in the regulations adopted by the Interstate Commerce Commission relating to tank cars, as set forth in Secs. 131.8 and 131.9, Title 49 (Transportation) Code of Federal Regulations, or elsewhere, will there be found any reference to a dome step board, by whatever name that device might be labeled.

By its very failure to prescribe any regulation governing such a device, the Interstate Commerce Commission has demonstrated its administrative determination that dome step boards do not fall within the scope of the Act.

A verdict should have been instructed on the first count.

In view of our agreement with appellant that the step

The Court below stated:

> "For it is not every device with which a car might be equipped which comes under, and is governed by the Safety Appliance Act or the regulations adopted by the Interstate Commerce Commission pursuant thereto. Only those are safety appliances which are officially determined by law or regulation to be such."

This statement is correct but where the law itself states that a running board is a safety appliance the Congressional declaration of running boards as safety appliances cannot be affected by either action or lack of action on the part of the ICC.

There is a clear field of operation for both Sections 11 and 12. Section 11 declares a congressionally fixed standard for ladders and running boards, i. e. "secure." Section 12 declares that where the ICC has standardized as to "number, dimension, location and manner of application" a running board or ladder which is "secure" might nevertheless violate the Act if it is not in compliance with the standardization regulation.

Under Section 12 the ICC has the power to change the standards fixed by its orders. If the ICC were to adopt an order setting out that tank cars should be equipped with a running board near the dome of the car to be so many feet long, fastened to the car in a certain manner, located so many inches from the top of the dome, etc., under the decision below the board would be a running board within the Safety Appliance Act only from the effective date of the order. If the ICC were to so act this year, under the decision below the appliance itself would be brought under the Act 44 years after Sections 11 and 12 were passed by Congress. The true interpretation of these sections is that for 44 years the standard of safety of any running board has been that it be "secure"; and that if the ICC ever issues a standardization regulation the rail-

is not a safety appliance, it is unnecessary for us to consider and decide whether defendant is right in its second position, that plaintiff, not benig a railroad worker, is not entitled to the protection of the Act. It is sufficient to refer to cases pro and con. *Patton v. Baltimore,* 197 Fed. 732; *Reisberg v. Duluth,* 47 NW(2) 113; *Fairport v. Meredith,* 292 U.S. 598; *Brady v. Terminal,* 303 U.S. 10; *Jacob v. Ill.,* 63 So. 306.

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We cannot agree with it, though, that the evidence established as matter of law that, in the exercise of due care, the defect was undiscoverable. On the contrary, we think there was sufficient evidence to take the second count to the jury.

Because, however, of the submission of the two counts for a general verdict,[a] and because of the errors in the giving and refusal of charges, the judgment may not be affirmed as to Atlantic on the second count.

As to plaintiff's appeal from the judgment for Southern Railway, Southern meets it first with a motion to dismiss because the appeal was not timely. The point made is that, instead of being taken within the time limited from the entry of the judgment in Southern's favor, it was not taken until after the motion of Atlantic for a judgment notwithstanding the verdict and, in the alternative, for a new trial, had been acted upon.

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[a] The court charged the jury: "You must determine, Gentlemen, whether the plaintiff is entitled to recover under either theory of this complaint. It is not necessary, however, if you find that the plaintiff is entitled to recover under either theory of this case."

roads then would have the additional duty of seeing that all running boards described therein meet the mechanical specifications of uniformity set out by the regulation. Obviously, the ICC by its regulations can neither add to nor subtract from the appliances to be included under the Act since Congress has already enumerated these appliances. The ICC has authority only to standardize and make uniform within the limits of Section 11; any item enumerated in Section 11 which has not been included in a standardization regulation still must be "secure."

Many requirements embraced by the term "secure" are not within the ICC regulations, for the ICC rule-making power goes only to "number, dimension, location and manner of application." If the ICC regulation as to running boards provided that each must be of "sound lumber and 2½ inches thick" there would be a question of whether this was within its rule-making power; but that question is not reached, for the regulations as to running boards do not mention the type or quality of material to be used in them, leaving that to be governed by the requirement of law that each running board be "secure."

The purpose of the rule-making power given ICC is to assure that on all cars the designated appliances are uniform and standard, so that employees moving about, often at night, can move with assurance. **Illinois Central Railroad Company v. Williams**, 242 U. S. 462.

As the evidence disclosed (R. 181), the running boards below the domes of tank cars have not been standardized, varying on different types of tank cars as to dimension, location, etc., but the effect of the decision below is that since these particular running boards have not been standardized by regulation they need not be secure as required by the Safety Appliance Act.

3. The decision below is in conflict with the decision of this Court in **Illinois Central Railroad Company v. Wil-**

Without laboring the matter by a discussion of them, it is sufficient to say that, under the cases cited by appellant, *Continental v. U.S.*, 167 F(2) 107, a case from this court of *Zimmern v. U.S.*, 298 U.S. 167, and the case of *Leishman v. Associated*, 318 U.S. 203, the point is not well taken. The appeal was timely. It may not be dismissed.

On the merits, however, we agree with Southern: that, under the undisputed facts, Southern was not the alter ego of the N.O. and N.E. Railway Company; that it was not, and could not be, sued as the original carrier; and that the district judge was right in instructing a verdict in its favor.

No useful purpose will be served by setting out in detail the evidence on which this conclusion is based. It suffices to say that while Southern, as the holding company, has the same general executive officers as its subsidiary, the other employees are not the same. The Southern Railway, as such, does not run or operate the N.O. & N.E. Railway Company, and it had nothing to do with the handling of the car in question, as originating carrier or otherwise. A consideration of the cases on which appellant relies for his different view shows that they do not, as applied to the facts of this case, at all support it. This is particualrly so with respect to the case on which he mainly relies, *Southern Railway v. Crosley*, 201 F(2) 873, in which the facts were wholly different.

Without setting out the facts of this case, it is sufficient to say that to hold under them that the Southern Railway Company may be sued as the operator of the N. O. and N.E. Railroad Company, and, therefore, the originating carrier, would require a holding in substance that a holding company is responsible simply, because it is a holding company, as the actor in the routine, the ordinary, activities of its wholly owned subsidiary in and about the business which

liams, 242 U. S. 462. In the **Williams** case the railroad argued that the requirement of Section 11 that grab irons be secure was suspended by an order of the ICC postponing the effective date of its regulations standardizing the number, dimensions, location and manner of application of grab irons. The railroad in the **Williams** case argued substantially what was held below, i. e., that Section 11 was so absorbed by Section 12 as to grant the ICC exclusive authority not only to standardize and make uniform safety appliances but also to designate which appliances are safety appliances and to fix by its orders the time when appliances are to become safety appliances. This Court in the **Williams** case rejected this contention and held that the absolute duty of maintaining as secure the Congressionally enumerated appliances was not affected by standardization orders of the ICC.

The reliance by the Circuit Court of Appeals on **Atchison, Topeka and Santa Fe Railroad Company v. Scarlett,** 300 U. S. 471, serves to add emphasis to the conflict with **Williams;** in the **Scarlett** case this Court specifically pointed out that the ladder in question was both "secure" as required by Section 11 and "standard" as required by the ICC regulations.

The holding below that a railroad is relieved of maintaining a running board as "secure" as required by 45 U. S. C., Section 11, because of the absence of an ICC regulation standardizing such a running board is in conflict with the **Williams** opinion.

Obviously, the judgment of the trial court and jury cannot be substituted for that of the ICC, as stated in the **Scarlett** case and relied on by the Circuit Court of Appeals. But the judgment of the Commission does not go to what is "secure", and outside the ICC's field of operation the court and jury must determine if the congressional mandate has been followed.

the subsidiary was incorporated to, and does, actively own and operate.

The judgment is AFFIRMED as to the Southern Railway Company. It is REVERSED and REMANDED as to the Atlantic Coast Line for further and not inconsistent proceedings.

4. The decision of the Court below is believed to be in conflict with the decision of the Ninth Circuit Court of Appeals in **Southern Pacific Company v. Carson**, 169 F. 2d 734. In the **Carson** case the plaintiff was injured when he was riding a "cut" of railroad cars. He was using a brake club to wind the staff brake in order to stop the cars and the brake club broke. The staff brake complied with ICC standardization regulations. The regulations made no mention of brake clubs just as the regulations in this case do not mention the particular running board which broke under petitioner.

The railroad argued that since the handbrake on the tank car conformed to the specifications set forth in the ICC regulations there could be no violation of the Safety Appliance Act. That is exactly what Atlantic argued and the Court below decided as to the running boards (i. e., that since it has complied with standardization requirements for bottom running boards there can be no violation of the Act by another and insecure running board on the car).

The Court held otherwise, stating:

> "We disagree. The Act (Sec. 11) in absolute and imperative terms requires that all cars 'be equipped with efficient handbrakes'. There can be no doubt that by this language Congress meant to require the installation of brakes acting or having the power to act effectually. Such is the meaning of ordinarily ascribed to the word 'efficient'. The Legislative mandate was not superceded or rendered nugatory by the Commission's order. Its virility, we think, remains unimpaired. No language which would support a contrary view is to be found in the statute."

In the Carson case, although the brake met the mechanical specifications of the Commission, nevertheless, the railroad was held liable under the Safety Appliance Act for

an inefficient brake because of the addition to the brake system of a defective brake club. In the present case the bottom running board of the tank car met the mechanical requirements of the Commission (or, at least, there is no evidence that it did not), but the railroad should be liable under the Safety Appliance Act for the addition of a defective top or dome running board to the system of running boards on the tank car.

Perhaps the theory of the Court of Appeals below was that once an ICC regulation sets the number, dimensions, location and manner of application of certain running boards those standardized running boards, and no others, need be "secure." Certainly it was not the Congressional purpose that regulations designed to create standard appliances for the safety of the worker operate to leave the worker at the mercy of unsafe appliances of the nature and character designated by the statute but not included in the regulations. The Congressional purpose is to protect the worker from an insecure running board, not merely from an insecure running board made uniform by the ICC. Assume that the ICC uniformity regulations require two ladders on a box car, located at certain points, attached in a certain manner, etc. but the railroad attaches two more ladders which are regularly used by employees and others for the purposes for which ladders on box cars are intended. Certainly employees do not use the two additional ladders at their peril.

Petitioner submits that the holding of the Ninth Circuit in the **Carson** case is the correct interpretation of Section 11 of the Act and the conflict with **Carson** arising from the opinion of the Court below should be resolved in petitioner's favor.

5. The decision below is believed to be in conflict with the decision of the Fourth Circuit Court of Appeals in **Davis v. Reynolds**, 280 F. 363, cert. den. 258 U. S. 627. The

Davis case involved sill steps which under section 11 of the Act are required to be "secure." The sill steps in question were worn and slick and this condition proximately caused the plaintiff's injuries. The railroad contended that it had discharged its duty under the Safety Appliance Act with respect to sill steps when it had securely fastened a step of the materials and dimensions required by the ICC. In short, the railroad in the **Davis** case argued that if it had complied with the ICC regulations it had complied with the requirements of the Safety Appliance Act. This is the position adopted by the Fifth Circuit in its decision below in the present case.

In the **Davis** case, however, the Fourth Circuit rejected this position and held that the railroad had the duty to comply with the statutory standard of "secure sill steps" as well as with mechanical standards for sill steps set by the ICC.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 11, 1955.

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APPENDIX.

A.

Title 45, United States Code, Section 11:

Safety Appliances Required for Each Car; When Hand Brakes May Be Omitted.

"It shall be unlawful for any common carrier subject to the provisions of Sections 1-16 of this title to haul, or permit to be hauled or used on its line, any car subject to the provisions of said sections not equipped with appliances provided for in sections 11-16 of this title, to-wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the top of such ladders; Provided, That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose. Apr. 14, 1910, c. 160, 2, 36 Stat. 298."

B.

Title 45, United States Code, Section 12:

Safety Appliances, as Designated by Commission, to Be Standards of Equipment; Modification of Standard Height of Drawbars.

"The number, dimensions, location, and manner of application of the appliances provided for by sections 4 and 11 of this title as designated by the Interstate Commerce Commission shall remain as the standards

of equipment to be used on all cars subject to the provisions of sections 1-16 of this title, unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause shown, and failure to comply with any such requirement of the Interstate Commerce Commission shall be subject to a like penalty as failure to comply with any requirement of sections 11-16 of this title. Said Commission is hereby given authority, after hearing, to modify or change, and to prescribe the standard height of drawbars and to fix the time within which such modification or change shall become effective and obligatory, and prior to the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard now fixed or the standard so prescribed, and after time so fixed or the standard so prescribed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard so prescribed by the commission. Apr. 14, 1910, c. 160, 3, 36 Stat. 298."

C.

Opinion Below

Before HUTCHESON, Chief Judge, HOLMES, Circuit Judge, and DAWKINS, District Judge.

HUTCHESON, Chief Judge: This is another case like *O'Donnell v. Elgin*, 338 U.S. 384, *Carter v. Atlanta*, 338 U.S. 430, and *Affolder v. New York, Chicago & St. Louis*, 339 U.S. 596, in which a claimant, for injury resulting from defects in a railroad car, invokes both the absolute liability imposed by the Safety Appliances Act, 45 U.S.C., Secs. 1 to 46, and the qualified liability arising out of negligence. In those cases it was negligence under the Federal Employers Liability Act, 45 U.S.C., Secs. 51 to 60. Here it is negligence at common law.

In those cases, particularly in the O'Donnell case, the Supreme Court points to the wide spread confusion attending the anomalous procedure employed in prosecuting such claims.[1] The same difficulties have made themsleves felt here with the result that on the appeal of the Atlantic Coast Line Railroad Company, the judgment must be reversed and the cause remanded.

The matter stands differently, however, on the appeal of plaintiff from the judgment upon a directed verdict as to the Southern Railway Company. For the reasons hereafter stated, as to it this judgment must be affirmed.

Brought against the Atlantic Coast Line Railroad Company, as the delivering, the Southern Railway Company,

---

1. "Notwithstanding this court's efforts to distinguish the safety appliance violation case from the common law negligence case, confusion of the two persists, in part, at least, due to the anomalous procedure by which such claims are litigated. * * * The appliance cause often is joined with one for negligence, and even sometimes, as here, mingled in a single mongrel cause of action. In addition, at trial, certain issues such as causation and extent of injury, for example, are common to both causes of action. * * *"

"* * *Pleadings will serve the purpose and limiting the issues only if claims based on negligence are set forth sparately from those based on violation of the appliance acts.

"But no mater how the pleadings are allowed to stand, we think it is almost indispensable to an intelligible charge to the jury that a clear separation of the two kinds of actions be observed and impressed. * * *" O'Donnell v. Elgin, 338 U.S. 384.

as the originating, carrier, the suit was for damages for personal injuries received by plaintiff, an independent contractor and invitee, as the result of the breaking when he stepped upon it of a dome step on a tank car which he had been engaged to unload.

Complying with the admonition of the court in the O'Donnell case, *supra*, the complaint was in two counts. Count One charged that the dome step was a safety appliance, and that its breaking was a violation of the Appliances Act. Count Two charged that the defendants negligently furnished and tendered, for the unloading of the gasoline therein, a defective tank car.

In addition to a general denial, the Atlantic Coast Line alleged as to the first count, (1) that the dome step was not a safety appliance within the meaning of the act, and (2) that if it was, plaintiff, not being a railroad employee, was not entitled to the benefits of theact.

As to the second count, the charge of common law negligence, it alleged: that the board which gave way had been newly painted; that the defect in it was not a patent but a hidden defect, which could not have been discovered by the use of ordinary care; and that the Atlantic Coast Line, as a delivering carrier, was not as matter of law, and could not be found, guilty of negligence in handling the car.

The Southern Railway alleged: that the Alabama Statute of Limitations of One Year had barred the cause of action as to it, and (2) that it was not the originating carrier, and that it had never had the car in its possession.

On the issues thus joined, the cause was tried to a jury

on evidence which included uncontradicted evidence: that the New Orleans and Northeastern Railroad Company was the initial carrier of the car; that the Southern Railway Company had at no time had anything to do with its handling; and that, though the stock of the New Orleans the Northeastern Railroad Company was solely owned by it, Southern Railway Company was an absolutely separate corporation that it did not operate its subsidiary; and that it had never handled the car.

The district judge, therefore, instructed a verdict for the Southern Railway and submitted the cause to the jury as to the Atlantic Coast Line on both counts and on a general charge.

There followed a general verdict and judgment for $7500.00 against Atlantic Coast Line from which that defendant has appealed, while plaintiff has appealed from the judgment in favor of the Southern Railway Company.

Here the Atlantic Coast Line insists that it should have had an instructed verdict on both counts, and that the judgment must be reversed and rendered for it. As to the first count, it claims: (1) that the dome step or platform was not a safety appliance; and (2) that if it was, plaintiff may not invoke the benefit of the act. As to the second count, its claim is that the evidence establishes as matter of law: that the defect in the board was not patent but latent and that defendant had made the usual careful inspection of the car and the defect complained of was not discoverable upon such an inspection.

In the alternative, it urges upon us that if it was not entitled to an instructed verdict throughout, it was certainly entitled to an instruction as to Count One, and, finally, that if it was not entitled to an instructed verdict

SUPREME COURT, U.S.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955.

No. 150.

W. A. SHIELDS,
Petitioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR THE PETITIONER.

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BRIEF FOR THE PETITIONER.

OPINIONS BELOW.

The judgment of the District Court (R. 297-298) is unreported. The opinion of the Circuit Court of Appeals (R. 341 et seq.) is reported at 220 F. 2d 242.

JURISDICTION.

The judgment of the Court of Appeals was entered March 17, 1955. The petition for certiorari was filed June 14, 1955, and was granted October 10, 1955. The jurisdiction of this Court rests on 28 U. S. C. Section 1254 (1).

STATUTES AND REGULATIONS INVOLVED.

The pertinent statutory provisions (45 U. S. C., Sections 11 and 12) are set forth in Appendices A and B. The pertinent regulations (Code of Federal Regulations, Title 49, Transportation, Sections 131.8 and 131.9) are printed in Appendices C and D.

QUESTION PRESENTED.

Are railroads relieved of the obligation imposed by 45 U. S. C., Section 11, to keep a designated appliance "secure" by reason of the fact that the Interstate Commerce Commission has not adopted a regulation standardizing and making uniform such an appliance?

STATEMENT.

On May 6, 1952, petitioner, an independent contractor, was instructed by the consignee of a tank car of gasoline to unload the tank car which had been placed on a siding in the freight yards of the respondent, Atlantic Coast Line Railroad Company in Montgomery, Alabama (R. 24, 25, 117, 118, 130, 131). At the time of his injury petitioner had been engaged in the business of unloading gasoline and related work for about twenty-five years (R. 129). The gasoline in the tank car which petitioner was to unload (SHPX 21336) was released out the bottom of the car by means of a flexible hose (R. 129, 130). But in order for the gasoline to flow out of the tank it is necessary for the dome cap on the top of the car to be removed and a valve inside the dome to be opened (R. 130). The dome cap, to which the railroad attaches the usual seal, is heavy and normally requires two men to handle (R. 129, 130).

After removing the dome cap and checking the valve, petitioner attached the flexible hose to the tank car (R.

132). He and his helper then climbed to the top of the car to open the valve (R. 132). Petitioner stepped on the running board which runs along the side of the tank near the top. The board broke causing him to fall to the tracks below (R. 132), inflicting painful and permanent injury to the vertebrae in his back. The running board upon which petitioner stepped was knotty, cracked and so rotten and crumbly it could be mashed in one's hand (R. 135).

As last amended, the complaint stated a cause in two counts against Atlantic Coast Line Railroad Company as delivering carrier and Southern Railway Company as originating carrier (R. 32-38). A verdict was directed for Southern (R. 273) which verdict was affirmed on appeal; Southern does not enter into the question presented before this Court and no further reference will be made to it.

In compliance with the admonition of this Court in **O'Donnell v. Elgin**, 338 U. S. 384, the complaint as to Atlantic separated into two counts the cause of action based on negligence and the cause of action for violation of the Safety Appliance Act in failing to maintain a "secure running board" as required by the Act (45 U. S. C., Section 11). At the conclusion of the trial, the Court charged the jury that the defective running board was covered by the Act and that it was for the jury to determine whether the running board was secure, and if not secure, whether petitioner was injured as a proximate result of its insecure condition (R. 274, 275). The trial court also charged the jury on the law as to the negligence count (R. 275-278). The jury returned a general verdict for petitioner against Atlantic for $7,500 (R. 297).

Atlantic's theory throughout the trial and on appeal was that the defective running board was not a safety appliance within the protection of the Safety Appliance Act because the Interstate Commerce Comission standardiza-

tion regulations relating to running boards on tank cars (Sections 131.8 and 131.9, Title 49, Code of Federal Regulations, Appendices C and D) do not include the defective running board in this case.

Atlantic appealed and the Court of Appeals, Fifth Circuit, reversed. On appeal, the Court adopted, as the basis of its decision, the argument of Atlantic that since the ICC had not made an order standardizing the running board in question as to "number, dimension, location, and manner of application," under the authority granted it in 45 U. S. C., Section 12, the board was not a running board within the Safety Appliance Act.

SUMMARY OF ARGUMENT.

Section 11 of the Safety Appliance Act provides that ". . . all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards . . ." Section 12 of the Act grants to the ICC authority to fix by regulation "The number, dimension, location, and manner of application of the appliances provided for by Sections 4 and 11 of this title . . ." Petitioner was injured as a result of a defective running board which had not been included by the ICC in its regulations, adopted under Section 12 for the purpose of giving uniformity of size, character, and placement of safety appliances provided for by Section 11. The Court below decided that the fact that ICC had not included the particular running board in its uniformity regulations operated as an administrative ruling, binding on petitioner and the Trial Court, that as a matter of law the particular running board was not required to be secure. The proper construction to be given the two Sections is that Congress has commanded by Section 11 that all running boards (which includes the defective board in this case) be secure, and by Section 12 Congress has commanded further that those appliances named in Section 11 shall conform to the uniformity orders of the ICC when such orders are made.

ARGUMENT.

Congress has commanded that "all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards . . ." 45 U. S. C., Section 11 (Appendix A). Petitioner suffered his injuries when a knotty, cracked, crumbly and rotten running board broke beneath him. Although the Court of Appeals refers to the defective board as a "dome step board" the record fully sustains the Trial Court's characterization of the appliance as a running board. Experienced railroad witnesses for both sides called it a running board (R. 180, 193, 259). Atlantic in its answers to interrogatories made by one of its superintendents refers to the defective board as a "running board" seven times (R. 24-30). Atlantic's repair records on the tank car, made long before there was litigation, call it a "dome running board" (Plaintiff's Exhibit 7, R. 184, 185). Even counsel for Atlantic referred to it as a running board during the trial (R. 194, 242, 259).

The defective board is used for standing and walking especially in loading and unloading of the tank car (R. 129, 130, 248, 249). This fact is common knowledge in the railroad business (R. 248). This particular board is also used by employees of the railroad in the course of their employment in passing hand signals, making temporary repairs or adjustments and replacing dome caps which have worked loose while a car is en route (R. 179).

This Court has stated clearly and repeatedly the congressional purpose intended to be accomplished by the Safety Appliance Act.

> "The Safety Appliance Act (45 U. S. C. A., Sec. 1, et seq.) has been liberally construed so as to give a right of recovery for every injury the proximate cause of which was a failure to comply with a requirement of the act." **Swinson v. Chicago, St. P., M. & O. Ry. Co.**, 294 U. S. 529.

"The Federal Safety Appliance Act is remedial, to protect employees and the public from injury because of defective railway appliances . . ." **United States v. State of California**, 297 U. S. 175.

"And this Act, fairly interpreted, must be held to protect all who need protection from dangerous results due to maintenance or operation of congressionally prohibited defective appliances." **Coray v. Southern Pacific Company**, 335 U. S. 520.

In this case petitioner was injured as a proximate result of an insecure, rotten running board. Petitioner, is a member of the general public who in the daily course of his duties must work on and around railroad equipment. Just as well as the railroad employees who must use running boards such as the one in question, he also needs protection from defective appliances.

Atlantic argued and the Court of Appeals decided that because the ICC in its regulations giving uniformity to certain appliances on certain kinds of tank cars (Section 131.8 and 131.9, Title 49, Code of Federal Regulations, Appendices C and D) did not include the running board in question, the board, as a matter of law, could not be a safety appliance within the scope of the Safety Appliance Act. The effect of this decision is that the ICC by regulating or failing to regulate "number, dimensions, location and manner of application" of railroad appliances has the authority to decide by its administrative orders which appliances Congress intended to be made safe and this administrative finding is binding on the Court and injured parties. The decision pre-empts any field of operation for Section 11 of the Act and is contrary to the congressional intent and the practical interpretation given the Act by the ICC.

Section 11 (Appendix A) provides that "all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards. . . ."

Section 12 (Appendix B) grants to the ICC authority to fix by regulation "the number, dimensions, locations and manner of application of the appliances provided for by Sections 4 and 11 of this title. . . ." There is a clear field of operation for both Sections. In the first Section Congress has declared an absolute standard of safety for ladders and running boards, i. e., they must be "secure." In the second Section Congress has commanded that where the ICC has standardized as to "number, dimension, location and manner of application" a ladder or running board in addition to being secure must also conform to the ICC uniformity order or be in violation of the Act.

The Court of Appeals found:

> "Nowhere in the regulations adopted by the Interstate Commerce Commission relating to tank cars, as set forth in Sees. 131.8 and 131.9, Title 49 (Transportation), Code of Federal Regulations, or else where, will there be found any reference to a dome step board, by whatever name that device might be labeled. By its very failure to prescribe any regulation governing such a device, the Interstate Commerce Commission has demonstrated its administrative determination that dome step boards do not fall within the scope of the Act."

The Court below thus clearly implies that the safety of working conditions intended by Congress to be assured by the Safety Appliance Act is to be limited by the scope of regulations seeking to give uniformity to satety appliances. The ICC regulations themselves make clear that safety (i. e., secure appliances) and uniformity are not co-terminous. For example, the regulations on running boards on tank cars (Appendix C and D) deal specifically with number, dimension, location and the manner of application, and they contain no requirement that running boards must be secure or not rotten and defective. They

do not deal with the material out of which running boards are to be made (cf. as to ladders, Sec. 131.8, Appendix C). Obviously this omission was made because Congress by Section 11 of the Act already had protected against appliances made from rotten material and an ICC regulation on such a subject was unnecessary. Under the Fifth Circuit's decision a rotten but uniform running board could not give rise to liability since the regulations do not prescribe materials for construction. Would an ICC inspector be without authority to penalize for a rotten running board so long as the appliance is the required size and fastened to the car in the prescribed manner? Is it not more probable that more people would be injured by rotten running boards than by those not of uniform size and location? Actually, it is clear that the Congressional intent was to protect against both kinds of dangers.

It is a matter of common knowledge that railroad cars are being redesigned and changed by the railroad industry. In the case of tank cars, there are several different types in use at the present time (R. 181, 182). It is natural that when changes in design result in additional appliances, the appliances may not be reflected immediately in ICC regulations. Assume that by ICC order boxcars were required to have ladders on only one side of a car. If boxcars were redesigned so as to place additional ladders on the other side, Atlantic would argue that there could be no liability under the Safety Appliance Act for a defective condition in the additional ladders until such date as the ICC issued a regulation fixing a new number of ladders per car and the dimensions, location and manner of application of the additional ladders. Suppose the ICC regulations called for only one grab iron at the top of a designated ladder. Atlantic contends that if a person were injured as a result of a second and defective grab iron, the Act's protection could not be invoked. The analogy would be true

as to a second and defective handbrake or any other safety appliance. Certainly, it is not the Congressional purpose that regulations of the ICC designed to protect the user by uniform appliances operate to place him at the mercy of unsafe appliances. The worker does not choose at his peril between two running boards, both designed to be stood on and walked on, but one standardized and the other not. The purpose of the Safety Appliance Act is to protect the worker from unsafe, congressionally-named appliances, not merely unsafe appliances made uniform by order of the ICC.

Section 12 grants the ICC authority to change and amend its orders. Assume that this year the ICC amended its regulations covering running boards on tank cars so as to omit the running boards presently included and add the running board which was defective in this case. Under the Atlantic position, the appliance named in the hypothetical order would become a safety appliance for the first time and the omitted appliance would cease to be a safety appliance, all 45 years after Congress declared that "all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards . . .". The true interpretation of the field of operation for the two sections is that since the enactment in 1910 of Section 11 all ladders and running boards must be secure and when and where the ICC has required an appliance to be uniform by its regulations, railroads have the additional duty of meeting the mechanical specifications of the ICC order. But the ICC by regulation can neither add to nor subtract from the list of appliances which must be secure. Congress having listed these appliances has granted the ICC only the power to make regulations concerning the congressionally-enumerated appliances when in the discretion of the ICC uniformity is necessary for the additional protection of those working about railroad cars.

It is significant that the authority of the ICC is to fix by regulation certain qualifications of the appliances provided for by Sections 4 and 11. This cannot properly be construed to mean that a running board under Section 11 is any less a running board, or any less a safety appliance, by reason of the absence of a regulation referring to it.

Also it is significant that Section 12 provides "... failure to comply with any such requirement of the Interstate Commerce Commission shall be subject to a like penalty as failure to comply with any requirement of Sections 11-16 of this title." If Atlantic's position is correct there would be no need for the quoted provision. If a railroad can satisfy its obligations under the Safety Appliance Act by complying with the ICC regulations promulgated under Section 12, how could a penalty be imposed for failure to comply with Section 11? Under Atlantic's construction there could be no violation of Section 11 which would not be also a violation of Section 12.

The Court of Appeals suggests in its opinion that the Safety Appliance Act could not be properly administered if railroads are to be held liable under the Act for the defective condition of appliances which have not been standardized. The Court stated:

> "As appellant correctly points out in the discussion in its brief, a chaotic condition would be produced if the question of compliance with the Safety Appliances Act and the specifications governing the number, location, dimension and manner of appliances should be left to the varying motions of judges or the inexperienced laymen who comprise petit juries."

Surely no hardship could fall on a railroad by requiring it to keep the appliances designated in the Safety Appliance Act in a secure condition whether those appliances have been standardized or not. Running boards, ladders, sill steps and grab irons are placed on railroad cars so

that those working about the cars may do so efficiently. Congress in the Safety Appliance Act has said that workers should also be able to work about the cars safely. The real chaotic condition will result if only those running boards, ladders, sill steps and grab irons required as a matter of uniformity need be secure and all others can be defective without statutory liability. If a worker is required to use a running board to put the tank car to the use for which designed and intended, he uses the board because it is there and is functionally necessary and presumably secured. And he so uses it without regard to whether it is one of the running boards made uniform and whether there is a uniform board elsewhere on the car.

This Court made clear at an early date that the authority of the ICC under Section 12 to make appliances uniform does not limit the rights of a person injured because of the defective condition of an appliance commanded by Section 11 to be kept safe. In **Illinois Central Railroad Company v. Williams**, 242 U. S. 462, the plaintiff was injured in 1913 when a grab iron at the top of a boxcar gave way. Grab irons, like running boards, are required by Section 11 of the Act, enacted in 1910, to be secure. Although at the time of injury the ICC had promulgated a standardization order, the effective date of the order had been postponed by the ICC until 1916. In **Williams** the railroad argued that since the ICC with full authority had postponed until 1916 the effective date on which the grab irons should conform to the regulation, the grab iron could be insecure prior to 1916 without statutory liability of the railroad. In substance, the railroad in the **Williams** case advanced the same construction of Sections 11 and 12 as made by 'Atlantic' and adopted by the Court below, i. e., that Section 11 must be so absorbed by Section 12 as to grant to the ICC exclusive authority not only to standardize and make uniform safety appliances but also to designate which appliances

are safety appliances and to fix by its orders and regulations the time when appliances are to become safety appliances.

This Court in **Williams** rejected the railroad's argument and held the defendant liable under the Safety Appliance Act for violating the requirement of secure grab irons. The opinion discusses the congressional purpose of enacting both Sections 11 and 12 of the Act. The purpose of Section 11 is stated to be "to convert the general legal duty of exercising ordinary care to provide such safety appliances and keep them in repair into a statutory, an absolute and imperative, duty of making them 'secure' and to enforce this duty by appropriately severe penalties." As for Section 12, the purpose is shown to be to require that the secure appliances shall ultimately conform to uniform location, size and character determined by ICC regulations.

Atlantic in its brief in opposition to the petition for certiorari takes the position that once the ICC has promulgated a regulation covering a particular appliance the **Williams** case is "obsolete and without legal effect." But the principle of the **Williams** case is that even though the ICC has no regulation in effect as to a particular appliance, the railroad has the duty of maintaining the appliance in a secure condition as required by the statute. In the present case petitioner seeks statutory protection against an insecure running board prior to any ICC uniformity order on this particular running board.

After the **Williams** case the Fourth Circuit decided **Davis v. Reynolds**, 280 F. 363, cert. den., 258 U. S. 627. In **Davis**, a railroad employee was injured when he slipped on a worn and slick sill step required by Section 11 to be secure. In affirming a judgment for the plaintiff the Court rejected the contention of the railroad that it had discharged its duty under the Safety Appliance Act with respect to sill steps when it securely fastened a step of the

materials and dimensions required by the ICC. The Fourth Circuit held as did the Court in the **Williams** case that the congressional mandate requiring secure appliances was not limited by the Commission's orders made pursuant to Section 12 of the Act.

Atlantic has taken the position that the present case is one like **Atchison, T. & S. F. Co. v. Scarlett**, 300 U. S. 471 and that the **Scarlett** case, in effect, overruled the **Williams** and the **Davis** cases. In the **Scarlett** case the plaintiff based his claim on a violation of the Act. The violation was alleged to consist of a brace rod that was in proximity to a ladder which brace rod caused plaintiff to fall when he stepped on it in the process of climbing the ladder. Although the Act designates ladders as safety appliances, it does not include brace rods. The ladder was "secure" (not defective) and its structure and location complied with ICC orders. Therefore this Court held that the Act was not violated by placing a brace rod within a permissible distance to the ladder. The running board in this case was not "secure". There is nothing in the opinion to substantiate the view that the regulations designed to give uniformity have the effect of abolishing statutory requirements of safety.

The rationale of the Ninth Circuit in **Southern Pacific Co. v. Carson**, 169 F. 2d 734, is the proper approach to the problem presented by this case. In the **Carson** case the plaintiff was injured when a wooden brake club used to wind the brake staff broke, causing plaintiff to fall from a cut of railroad cars. The staff brake complied with ICC standardization orders which made no mention of brake clubs. Plaintiff, claiming under the Safety Appliance Act, relied on the language of the Act requiring "efficient hand brakes." The railroad contended that since the staff brake fully complied with the ICC orders there could be no violation of the Act resulting from a defective brake club not included in the regulations. The Ninth Circuit in affirm-

ing a judgment in favor of the plaintiff held that it was properly a jury question to determine whether the brake was "efficient" because of the addition to the brake system of a defective brake club. In this case the bottom running board of the tank car met the mechanical requirements of the ICC (or, at least, there is no evidence that it did not), but the railroad should be liable under the Act for the addition of a defective top or dome running board to the system of running boards on tank cars used on its lines. As the opinion in the **Carson** case points out, it can be just as dangerous to add defective appliances to the standardized appliances as to fail to attach to a car an appliance required by the ICC.

Actually, it may be that the board in question is one of the running boards described in the ICC regulations. Section 131.8 (Appendix C) provides for one continuous running board around the sides and ends of the car or two side running boards. Car SHPX 21336 had a long board along each side near the wheels and lower than the board in question. However, under "Manner of Application," Section 131.8 shows the ICC contemplated that running boards may be above the center of the tank, as this one was, instead of below. Also under "Ladders" this section indicates that a running board may be sufficiently high so that ladders may be required to reach it, which was the case on this car (R. 137, 138). A horizontal side-handhold is required "attached to top of running board projecting outward above sill-steps or ladders on tank cars without side-sills." On this car there was a ladder leading to the defective running board and a horizontal handhold projecting downward from the running board (R. 137, 138).

Section 131.9 (Appendix D) provides for continuous boards only around sides and ends of the car. But it, too, reveals that the running boards may be above the center of the tank and that the car must have four sill steps if it has "high running boards making ladders necessary."

Horizontal side handholds are provided to be attached to the running board projecting downward or outward.

Petitioner feels that the running board here may be within the language of the regulations and he may have assumed too much in presenting the main thrust of his argument on the basis the regulations did not cover it. It is not his intention to waive the point. However, even if the regulations do not specifically cover they do show that ICC realizes a running board may be located high on a tank car (where it is usable for performing the unloading work which petitioner here was performing when hurt), and that a user in such a position is entitled to safe appliances in getting up and down and security while in place on the high board.

In conclusion petitioner submits that having been injured, as a proximate result of an insecure running board, he is entitled to invoke the benefits of the Act in seeking redress for his injuries. Belonging to a class intended to be protected by the Act he should not be denied that protection because the ICC orders designed to give uniformity do not list the defective appliance.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals should be reversed.

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APPENDIX "A".

Statutes Referred To.

Title 45, United States Code.

Section 11. Safety appliances required for each car; when hand brakes may be omitted.

"It shall be unlawful for any common carrier subject to the provisions of Sections 1-16 of this title to haul, or permit to be hauled or used on its line, any car subject to the provisions of said sections not equipped with appliances provided for in sections 11-16 of this title, to-wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the tops of such ladders: PROVIDED, That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose. Ap. 14, 1910, c. 160, 2, 36 Stat. 298."

APPENDIX "B".

Statutes Referred To.

Title 45, United States Code.

Section 12. Safety appliances, as designated by commission, to be standards of equipment; modification of standard height of drawbars.

"The number, dimensions, location, and manner of application of the appliances provided for by sections 4 and 11 of this title as designated by the Interstate Commerce Commission shall remain as the standards of equipment to be used on all cars subject to the provisions of sections 1-16 of this title, unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause shown; and failure to comply with any such requirement of the Interstate Commerce Commission shall be subject to a like penalty as failure to comply with any requirement of sections 11-16 of this title. Said commission is hereby given authority, after hearing, to modify or change, and to prescribe the standard height of draw-bars and to fix the time within which such modification or change shall become effective and obligatory, and prior to the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard now fixed or the standard so prescribed, and after the time so fixed or the standard so prescribed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard so prescribed by the commission. Apr. 14, 1910, c. 160, 3, 36 Stat. 298."

APPENDIX "C".

Regulations Adopted by the Interstate Commerce Commission in Pursuance of Sections 11 and 12, Title 45, United States Code.

Section 131.8 (Page 203) Code of Federal Regulations, Title 49—Transportation.

TANK CARS WITHOUT SIDE-SILLS AND TANK CARS WITH SHORT SIDE-SILLS AND END-PLATFORMS.

Hand-Brakes.

Number:

Same as specified for "Box and other house cars."

Dimensions:

Same as specified for "Box and other house cars."

Location:

Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be located on end of car to the left of center.

Manner of Application:

Same as specified for "Box and other house cars."

RUNNING BOARDS.

Number:

One (1) continuous running-board around sides and ends; or two (2) running full length on tank, one (1) on each side.

Dimensions:

Minimum width on sides, ten (10) inches.

Minimum width on ends, six (6) inches.

Location:

Continuous around sides and ends of cars. On tank cars having end platforms extending to bolsters, running-boards shall extend from center to center of bolsters, one (1) on each side.

Manner of Application:

If side running-boards are applied below center of tank, outside edge of running-boards shall extend not less than seven (7) inches beyond bulge of tank.

The running-boards at ends of car shall be not less than six (6) inches from a point vertically above the inside face of knuckle when closed with coupler-horn against the buffer-block, end-sill or back-stop.

Running-boards shall be securely fastened to tank or tank-bands.

SILL-STEPS.

Number:

Same as specified for "Box and other house cars."

Dimensions:

Same as specified for "Box and other house cars."

Location:

One (1) near each end on each side under side-hand-hold.

Outside edge of tread of step shall be not more than four (4) inches inside of face of side of car, preferably flush with side of car.

Tread shall be not more than twenty-four (24) preferably not more than twenty-two (22), inches above the top of rail.

Manner of application:

Same as specified for "Box and other house cars."

LADDERS.

(If running-boards are so located as to make ladders necessary)

Number:

Two (2) on cars with continuous running-boards.

Four (4) on cars with side running-boards.

Dimensions:

Minimum clear length of tread, ten (10) inches.

Maximum spacing of treads, nineteen (19) inches.

Hard-wood treads, minimum dimensions, one and one-half (1½) by two (2) inches.

Wrought iron or steel treads, minimum diameter, five-eighths (⅝) of an inch.

Minimum clearance, two (2) preferably two and one-half (2½) inches.

Location:

On cars with continuous running-boards, one (1) at right end of each side.

On cars with side running-boards, one (1) at each end of each running-board.

Manner of application:

Ladders shall be securely fastened with not less than one-half (½) inch bolts or rivets.

SIDE-HANDHOLDERS.

Number:

Four (4) or more.

Dimensions:

Same as specified for "Box and other house cars."

Location:

Horizontal: One (1) on face of each side-sill near each end on tank cars with short side-sills, or one (1) attached to top of running-board projecting outward above sill-steps or ladders on tank cars without side-sills. Clearance of outer end of handhold shall be not more than twelve (12) inches from end of car.

If side safety-railings are attached to tank or tank-bands four (4) additional sill vertical handholds shall be applied, one (1) as nearly as possible over each sill-step and securely fastened to tank or tank-band.

Manner of application:

Same as specified for "Box and other house cars."

END HANDHOLDS.

Number:

Four (4).

Dimensions:

Same as specified for "Box and other house cars."

Location:

Horizontal: One (1) near each side of each end of car on face of end-sill. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

Manner of application:

Same as specified for "Box and other house cars."

TANK-HEAD HANDHOLDS.

Number:

Two (2). (Not required if safety-railing runs around ends of tank.)

Dimensions:

Minimum diameter five-eighths (⅝) of an inch, wrought-iron or steel.

Minimum clearance two (2), preferably two and one-half (2½) inches.

Location:

Horizontal: One (1) across each head of tank not less than thirty (30) nor more than sixty (60) inches above platform on running-board. Clear length of handholds shall extend to within six (6) inches of outer diameter of tank at point of application.

Manner of application:

Tank-head handholds shall be securely fastened.

SAFETY-RAILINGS.

Number:

One (1) running around sides and ends of tank or two (2) running full length of tank.

Dimensions:

Minimum diameter, seven-eighths (⅞) of an inch, wrought iron or steel.

Minimum clearance, two and one-half (2½) inches.

Location:

Running full length of tank not less than thirty (30) nor more than sixty (60) inches above platform or running-board.

Manner of application:

Safety-railings shall be securely fastened to tank or tank-bands and secured against end shifting.

End-Ladder Clearance.

No part of car above end-sills within thirty (30) inches from side of car, except buffer-block, brake-shaft brackets, brake-wheel, running-boards or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill, and no other part of end of car or fixtures on same, above end-sills, other than exceptions herein noted, shall extend beyond the outer face of buffer-block.

Uncoupling-Levers.

Same as specified for "Box and other house cars."

APPENDIX "D"

Regulations Adopted by the Interstate Commerce Commission Pursuant to Sections 11 and 12, Title 45, United States Code.

Section 131.9 (Page 205). Code of Federal Regulation, Title 49.—Transportation.

TANK CARS WITHOUT END-SILLS.

HAND-BRAKES.

Number:

Same as specified for "Box and other house cars."

Dimensions:

Same as specified for "Box and other house cars."

Location:

Each hand-brake shall be so located that it can be safely operated while car is in motion. The brake-shaft shall be located on end of car to the left of center.

Manner of application:

Same as specified for "Box and other house cars."

BRAKE-STEP.

Same as specified for "Box and other house cars."

RUNNING-BOARDS.

Number:

One (1)

Dimensions:

Minimum width on sides, ten (10) inches.

Minimum width on ends, six (6) inches.

Location:

Continuous around sides and ends of tank.

Manner of application:

If running-boards are applied below center of tank, outside edge of running-board shall extend not less than seven (7) inches beyond bulge of tank.

Running-boards at ends of car shall be not less than six (6) inches from a point vertically above the inside face of knuckle when closed with coupler-horn against the buffer-block, end-sill or back-stop.

Running-boards shall be securely fastened to tank or tank-bands.

SILL-STEPS.

Number:

Four (4). If tank has high running-boards, making ladders necessary, sill-steps must meet ladder requirements.

Dimensions:

Same as specified for "Box and other house cars."

Location:

One (1) near each end on each side, flush with outside edge of running-board as near end of car as practicable.

Tread not more than twenty-four (24) preferably not more than twenty-two (22) inches above the top of rail.

Manner of application:

Steps exceeding eighteen (18) inches in depth shall have an additional tread and be laterally braced.

Sill-steps shall be securely fastened with not less than one-half (½) inch bolts with nuts outside (when possible) and riveted over, or with one-half (½) inch rivets.

SIDE-HANDHOLDS.

Number:

Four (4) or more.

Dimensions:

Same as specified for "Box and other house cars."

Location:

Horizontal: One (1) near each end on each side of car over sill-step on running-board, not more than two (2) inches back from outside edge of running-board, projecting downward or outward.

Where such side-handholds are more than eighteen (18) inches from end of car, an additional handhold must be placed near each end on each side not more than thirty (30) inches above center line of coupler.

Clearance of outer end of handhold shall be not more than twelve (12) inches, from end of car.

If safety-railings are on tank, four (4) additional vertical handholds shall be applied, one (1) over each sill-step on tank.

Manner of application:

Same as specified for "Box and other house cars."

END-HANDHOLDS.

Number:

Four (4).

Dimensions:

Same as specified for "Box and other house cars."

Location:

Horizontal: One (1) near each side of each end of car on running-board, not more than two (2) inches back from edge of running-board projecting downward or outward, or on end of tank not more than thirty (30) inches above center line of coupler.

Manner of application:

Same as specified for "Box and other house cars."

SAFETY-RAILINGS.

Number:

One (1).

Dimensions:

Minimum diameter seven-eighths (⅞) of an inch, wrought iron or steel.

Minimum clearance two and one-half (2½) inches.

Location:

Safety-railings shall be continuous around sides and ends of car; not less than thirty (30) nor more than sixty (60) inches above running-board.

Manner of application:

Safety-railings shall be securely fastened to tank or tank-bands, and secured against end shifting.

Uncoupling Levers.

Number:

Same as specified for "Box and other house cars."

Dimensions:

Same as specified for "Box and other house cars," except that minimum length of uncoupling-lever shall be forty-two (42) inches, measured from center line of end of car to handle of lever.

Location:

Same as specified for "Box and other house cars," except that uncoupling-lever shall be not more than thirty (30) inches above center line of coupler.

End-Ladder Clearance.

No part of car above buffer-block within thirty (30) inches from side of car, except brake-shaft, brake shaft brackets, brake-wheel or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or back-stop, and no other part of end of car or fixtures on same, above buffer-block, other than excepts herein noted, shall extend beyond the face of buffer-block.

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955.

No. 150.

W. A. SHIELDS,
Petitioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

REPLY BRIEF FOR THE PETITIONER.

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REPLY BRIEF FOR THE PETITIONER.

The question presented by this case as stated in the Petition for Certiorari was:

> "Are railroads relieved of the obligation imposed by 45 U. S. C., Section 11, to keep a designated appliance 'secure' by reason of the fact that the Interstate Commerce Commission has not adopted a regulation standardizing and making uniform such an appliance?"

Respondent and the ICC answer this in the affirmative. They argue (1) the particular appliance which caused petitioner's injury is not a running board so as to be within

the requirements of the Safety Appliance Act because it has not been standardized by the ICC, and (2) even if the appliance is a running board it is not a safety appliance because it has not been standardized by the ICC. Respondent makes the further argument that, since petitioner is not an employee of a railroad, he cannot invoke the protection of the Act.

Respondent and the ICC argue that compliance with the provisions of the Safety Appliance Act is measured solely by compliance with ICC orders. As pointed out in petitioner's prior brief, this leaves no field of operation for Section 11 of the Act, which sets a congressional standard for appliances, i. e., "secure" or "efficient." ICC regulations have no such requirement. They merely standardize. The ICC and respondent would have this court hold that, by granting the ICC authority to make appliances uniform, Congress by implication has vested in the ICC complete authority to decide by its regulations which appliances are safety appliances.

The Appliance Causing Petitioner's Injury Was a Running Board.

The Safety Appliance Act requires that running boards be secure; therefore, respondent commences its brief with a condemnation of what it labels petitioner's "persistent assumption" that the appliance in question is a running board. Respondent was just as persistent in referring to it as a running board until petitioner amended his complaint to allege respondent's violation of the Safety Appliance Act. Respondent's repair order on the defective board designates it "dome running board" (Pl. Ex. 7, R. 184, 185). In answer to interrogatories, respondent refers to it as a running board seven times (R. 24-30). Even at the trial, witnesses for respondent and respondent's counsel lapsed into references to the board as a "running board" (R. 242, 259, 260). Having abandoned "running

board" for dome step board only after being confronted with a violation of the running board provisions of the Safety Appliance Act, respondent is critical of petitioner for not joining in its inconsistency. Despite the record respondent wishes to argue that there is no basis for the Trial Court's treating this appliance as a running board. But respondent's brief makes clear that its only basis for such argument is the omission of the appliance by the ICC in its standardization order.

Respondent and the ICC argue that the board in question is not a running board because if it had been the ICC would have standardized it. (See brief of ICC at page 13.) But, at page 11 of its brief, the ICC acknowledges that it has not standardized the ladder on the tank car extending between the bottom running board and the dome of the car. The ICC forbears arguing that this "ladder" is any less a ladder for its omission to standardize it. Indeed, the ICC concedes that it is a ladder. It fails to explain, however, why its omission to standardize a running board is persuasive that the appliance is not a running board while its omission to standardize a ladder has no such effect.

Actually, the ICC has stated its present understanding of why it did not standardize this appliance. It has nothing to do with any determination that the appliance was not a running board. The ICC states that only appliances which it deems directly connected with the movement of trains are standardized. Petitioner acknowledges that in determining whether an appliance is a safety appliance a court should give weight to the views of the ICC; but in determining whether a particular appliance is a running board, ladder or grab iron no significance whatever should be attached to the omission of such an appliance from the standardization orders of the ICC when the admitted basis of the omission is an administrative determination that the appliance is a loading and unloading device as opposed to a device directly used in the operation of a train.

The ICC reads that portion of Section 11 of the Act providing that "all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards" as meaning "all cars requiring secure ladders and secure running boards which are used in and about the movement and operation of cars shall be equipped with such ladders and running boards."

The ICC reasons that the sole Congressional purpose in the Safety Appliance Act is the protection of trainmen from defective equipment used in the movement of cars. Petitioner submits the ICC is in error both in its factual assumption that this appliance is used merely as a loading device and in its narrow construction of the intention of Congress as expressed in the Act.

The record clearly shows that the defective board was of a kind customarily used by railroad men in the operation and movement of trains.[1] Just as petitioner in loading tank cars used this board as well as standardized appliances, so do employees engaged in the movement of trains. Yet the ICC would deny the humane protection of the Act to employees as well as to petitioner from any equipment not standardized by ICC regulation.

In seeking to give a narrow construction to the intent of Congress in enacting the Act, the ICC argues that the primary concern of Congress in enacting the statute was

[1] Record, 178, 179:

Q. In your experience on the railroad, Mr. Kelley, have you ever seen an employee of a railroad standing on, or using that board at the top there that you have said you have heard many times called a running board?

A. Yes, sir.

Q. For what purpose do the employees of the railroad use that running board?

A. I have seen train crews use it to get up there where they can be in view and pass hand signals, and I have seen dome covers work loose on tank cars en route and they would have to get up and use this board to stand on while they made temporary repairs or adjustments on them.

to reduce the mounting toll of injuries and deaths to trainmen on moving trains. Petitioner agrees, of course, that when the statute was enacted Congressional attention was focused primarily upon accidents to trainmen in the interstate movement of trains. But this Court has refused repeatedly to limit the broad protection of the Act to this acknowledged major purpose. In **Fairport, P. & E. R. Co. v. Meredith**, 292 U. S. 589, in holding that a motorist injured at a grade crossing could invoke the air brake provisions of the Act, this Court stated:

> "It may fairly be said the nature of the duties imposed by a statute and the benefits resulting from its performance usually determine what persons are entitled to its protection."

To argue, as does the ICC, that an employee is protected by the Safety Appliance Act as he moves from car to car over the bottom running boards of a tank car, but he is unprotected when standing on a top running board to pass signals or check seals, is to draw a line for Congress which Congress would not draw for itself. Injuries from defective top running boards are just as disabling as injuries from bottom running boards. Congress has declared that both be secure and, by Section 12, those standardized by the ICC be uniform. "Nothing in either the language or the legislative history discloses expressly any intent to exclude from the Act's coverage" injuries from an insecure ladder or insecure running board merely because the primary function of the ladder or running board was for loading or unloading the car. See the approach to a similar problem and the quoted language of this Court in **Urie v. Thompson**, 337 U. S. 163, 69 S. Ct. 1018, 1030, where this Court was considering the scope of the Federal Employers' Liability Act. Congress anticipated that the nature of appliances could and would change and therefore granted the ICC the power and authority to amend its standardization orders, 45 U. S. C. Sec. 12. The fact that the ICC has

not exercised its power to standardize this appliance should not be allowed to take from those who are using this running board the statutory assurance that it be secure.

At page 13 of its brief, the ICC states that if it had deemed the appliance in suit a running board it would have standardized it. Petitioner has already shown that this is incorrect by pointing out the omission of the ICC to standardize the ladder on this car. The argument is unsound for a second reason. There are good reasons for allowing railroads to experiment further with improved tank car design. Petitioner suggests no compelling reasons why the ICC even at this date should regulate the width or thickness of a top running board on a tank car. Apparently it is practical to design a tank car with different unloading devices and with no top running board at all (R. 182). This does not indicate that cars requiring such running boards need not have them secure.

The ICC recognized long ago that defective appliances not included in the Act are not always repaired even when attention is called to them.[2] The record shows that the running board in question is now being treated as a safety appliance by railroads (R. 178). The obvious result of declaring it other than a safety appliance will be to increase the hazard to railroad men and others who must use it.

Petitioner agrees with respondent and the ICC that it was a question of law for the Trial Court to decide whether the device in question was a running board and a safety appliance. As demonstrated hereinbefore, the record fully supports the Trial Court's decision. Neither respondent nor the ICC suggests any evidence in the record to substantiate a contrary holding. And, as has been demonstrated, no significance can be attached to their argument that this

[2] 21st Annual Report of the Interstate Commerce Commission, 1907. See ICC Brief, p. 6.

is not a running board because not included in a standardization order. But even if the ICC is correct and "considerable weight" should be given its presently announced position, the Trial Court was correct in its decision that the board in question was a running board and a safety appliance. On the one hand, the Trial Court had before it the testimony of witnesses that the board was a running board, and the command of Section 11 of the Act that running boards be secure. It also had before it respondent's answers to interrogatories and respondent's repair order referring to the device as a running board and the testimony of experienced railroad men that this was treated by car inspectors and railroads as a safety appliance (R. 178). On the other hand, the Trial Court had before it the regulations of the ICC which are silent. On this record the Trial Court properly ruled that the appliance was a safety appliance and submitted the question of its compliance with the Act to the jury.

Petitioner was injured while preparing to unload this tank car because of a defective but nonstandardized running board. It could just as easily have been a flagman passing signals from the top of the tank car, or a conductor checking the seal on the car. All work on and about this running board in their daily tasks. Each needs protection from maintenance of the running board in a defective condition. Congress, having imposed "an absolute and imperative duty of making them secure," has sought to give to each this protection. **Illinois Central v. Williams**, 242 U. S. 462. Any action on the part of the ICC in standardizing the board should not be allowed to take it away.

The Running Board Causing Petitioner's Injury Is One Within the Protection of the Safety Appliance Act.

Respondent and the ICC take the position in their briefs that, even if the defective appliance is a running board, it

is not within the protection of the Safety Appliance Act since it is not one which has been standardized by the ICC. They argue that when Congress declared "all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards" it meant "all cars required by the ICC to have secure ladders and running boards shall be equipped with such ladders and running boards." Once again respondent and the ICC seek to read into Section 11 of the Act language Congress did not use. If, as is argued, Congress meant, "required by the ICC," it would have been a simple matter to have so stated.

The proper construction of the word "requiring" is made clear when considered in the context of the other provisions of Section 11.

> "All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars requiring ladders shall also be equipped with secure handholds or grab irons on their roofs at the tops of such ladders . . ."

The obvious intention of the Section is that every car—box, tank, flat, gondola, etc.—shall conform to the sill step and hand brake requirements. Not all cars need ladders and running boards for their proper use. There is no place on a flat car or a gondola for a ladder or running board (ICC brief, footnote 10, page 12). Congress, not wishing to demand useless expense to car manufacturers, used the terms "all cars requiring" when setting the standard of safety for ladders and running boards. The correct construction of the quoted clause is that a particular railroad car "requiring" a ladder or running board for its proper or efficient use must have such ladder or running board secure; not that only such ladders and running boards as are "required" by the ICC must be secure.

The principle of **Ill. Central v. Williams**, 242 U. S. 462, makes clear that the ICC regulations are for the purpose of uniformity rather than enumeration of which appliances shall conform to the Congressionally fixed standards of "secure" or "efficient." Congress declared which appliances are to be safety appliances. The ICC has been delegated only the power to standardize those appliances. **Williams** does not reference ICC regulations in determining whether the ladder in question was one requiring a secure grab iron at the top. Indeed, the question in **Williams** was whether the Act applied before the effective date of the regulations. **Williams** holds that if a car requires a ladder for its proper use the handhold at the top of the ladder must be secure.

As this Court stated in the **Williams** case at page . . . :

> "The congressional purpose in enacting Sec. 2 of the Act is very plain. At the time the Act was passed railroad carriers had in service many box cars, **requiring for their proper use** secure ladders and secure handholds or grab irons on their roofs at the tops of such ladders, and **the purpose of this section clearly is to convert the general legal duty of exercising ordinary care to provide such safety appliances and to keep them in repair into a statutory, an absolute and imperative, duty, of making them 'secure,'** . . ." (Emphasis added.)

The Court which wrote the **Williams** opinion would be somewhat surprised to hear the argument of respondent and the ICC, being made nearly forty years after the **Williams** case, that as to cars "requiring for their proper use" ladders and running boards railroads are not under a "statutory, an absolute and imperative, duty, of making them secure" unless such appliances have been standardized by the ICC.

As already pointed out in this brief, there may be sound, practical reasons for not standardizing or freezing all tank car design, but none of these reasons affords a logical basis for contending that the running board placed on cars "requiring for their proper use" such boards need not have them "secure."

In **Lilly v. Grand Trunk Western R. Co.**, 317 U. S. 481, this Court was considering an alleged violation of the Boiler Inspection Act. The violation of the Act was shown to have been ice on the locomotive's tender which violated the provisions of the Act prohibiting maintenance of a condition involving "unnecessary peril to life or limb." No order of the ICC was considered by the trial court or jury which found for the plaintiff. This Court stated:

> "The use of a tender upon whose top an employee must go in the course of his duties, which is covered with ice, seems to us to involve 'unnecessary peril to life or limb'—enough so as to permit a jury to find that the Boiler Inspection Act has been violated."

The Court goes on to demonstrate that there was an ICC regulation requiring tenders to be clean upon which it could rest its decision. But the opinion clearly implies that the jury was entitled to find the Act violated on the facts presented without any ICC regulation on the subject.

As the Boiler Inspection Act in **Lilly v. Grand Trunk** could be violated without violation of any ICC regulation, so can the Safety Appliance Act by the maintenance of an insecure ladder or running board, even though there is no ICC order standardizing the defective appliance.

Respondent in its brief (p. 6) asserts that petitioner's construction of the Safety Appliance Act places it in an anomalous position because it cannot refuse to accept from other carriers cars equipped as required by the ICC. But, as pointed out in petitioner's brief on the merits, there

is no requirement in the ICC regulations that a running board be secure. Respondent's argument when carried to its logical conclusion is that it would be perfectly free to haul cars with insecure running boards without violating the Safety Appliance Act. This argument overlooks completely that the injury and death Congress sought to stop was caused just as much, if not more, from defective appliances as from non-uniform appliances.

Petitioner Is Not Barred From a Recovery Under the Safety Appliance Act Because He Is Not a Railroad Employee.

Respondent argues that the Safety Appliance Act was enacted for the purpose and effect of facilitating employee recovery and was not intended to extend to persons other than railroad employees. Once again respondent seeks to interpret the Congressional intent in narrow limits which this Court has consistently refused to do.

In **Fairport, P. & E. R. Co. v. Meredith**, 292 U. S. 589, the railroad was attacking in this Court a judgment in favor of a motorist injured at a grade crossing as a result of the railroad's violation of the air brake provisions of the Safety Appliance Act. The ground of attack was the same presented by respondent in this case, i. e., that the protection of the Act does not extend beyond employees and passengers on the railroad. Refusing to adopt such a narrow construction of the Act, this Court stated:

> "To confine the beneficial effect of these provisions to employees and passengers would be to impute to Congress an intention to ignore the equally important element which their enactment actually contributes to the safety of travelers at highway crossings. Since all of these three classes of persons are within the mischief at which the provisions are aimed, it is quite reasonable to interpret the statute imposing the duty as including all of them."

While obviously **Meredith** does not interpret the extent of the coverage of the Act beyond the fact situation before the Court in that case, if the Act extends to one in an automobile injured at a grade crossing surely it includes a workingman using the appliance on the railroad car for the very purpose for which it was primarily designed.

The Supreme Court of Missouri, in **Rush v. Thompson**, 356 Mo. 568, 202 S. W. 2d 568 (1947), relied on **Meredith** in holding that an employee of the consignee of coal was within the Act's protection. The principle of the **Rush** case is clearly applicable here.

In its brief respondent cites **Patton v. B. & O. R. Co.**, 197 F. 2d 732 (C. A. 3, 1952); **Risberg v. Duluth, M. & I. R. Co.**, 233 Minn. 396, 47 N. W. 2d 113, and **Paul v. D. M. & I. R. Co.**, 96 F. Supp. 578 (D. C. Minn., 1950), in support of its argument that the Safety Appliance Act cannot be invoked by non-railroad employees. Petitioner has no quarrel with the holdings or the principles of these cases.

In each of these cases the plaintiff was an employee of a company operating a private railroad to whom the defendant railroad had delivered cars. In each case the plaintiff was injured while these cars were being used on the lines of his employer. The language of the Act is that no carrier shall "haul, or permit to be hauled or used on **its** line, any car . . ." (Emphasis supplied.) In the three cases cited by respondent, the defective cars not being in use on the defendants' lines, the defendant was relieved of liability. The fact that the plaintiffs were non-railroad employees was not significant. Here it is undisputed that the defective car was in use on respondent's line at the time of the injury and hence the three cases cited by respondent have no application.

Respondent also cites **Brady v. Terminal Railroad Association**, 303 U. S. 10, 58 S. Ct. 426. In **Brady** the plaintiff was a car inspector. He was on the defendant's lines to

inspect cars being delivered to his employer and while he was inspecting cars he was injured. Among other things this Court points out: "The fact that petitioner was not an employee of the Terminal Association did not necessarily absolve it from duty to him." The **Brady** case holds that an employee of one railroad can recover against another railroad for a violation of the Safety Appliance Act. This Court in **Brady** refused to limit the Act's protection to employees of the particular defendant railroad. Its opinion cannot logically be construed as deciding that only railroad employees can recover for violations of the Act.

This Court has carefully refrained from any narrow interpretation of the Safety Appliance Act which would increase the probability of injury to those earning their livelihood working in and around trains.

> "And this Act, fairly interpreted, must be held to protect all who need protection from dangerous results due to maintenance and operation of congressionally prohibited appliances." **Coray v. Southern Pacific,** 335 U. S. 520.

Petitioner is one of the class who must go on tank cars in order to earn his livelihood. As much as any employee he needs and deserves protection from defective appliances commanded by Congress to be safe.

Respectfully submitted,

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Office Supreme Court, U. S.
FILED
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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 150.

W. A. SHIELDS,

Petitioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF RESPONDENT IN OPPOSITION.

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BRIEF OF RESPONDENT IN OPPOSITION.

Opinions Below.

The judgment of the District Court (R. 297-298) is unreported. The opinion of the Circuit Court of Appeals (R. 345-354), reported in 220 F. 2d 242, is printed as Appendix "E" hereof.

Jurisdiction.

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented.

Petitioner, in his statement of the questions, presupposes that the Interstate Commerce Commission has not adopted any regulation prescribing the "number, dimension, location and manner of application" of running boards with which railroad tank cars are required to be equipped.

Title 45, Section 12, U. S. C. provides that "the number, dimensions, location and manner of application of the appliances provided for by Sections 4 and 11 of this title as designated by the Interstate Commerce Commission shall remain as standards of equipment to be used on all cars subject to the provisions of Sections 1-16 of this Title" (Appendix "B").

Pursuant to Sections 11 and 12, Title 45, U. S. C. the Interstate Commerce Commission adopted regulations as to the number, location, etc. of running boards on tank cars. Code of Federal Regulations, Title 49-Transportation, Section 131.8, page 203 and Section 131.9, page 205 (Appendix C and D).

We therefore submit that the question should be stated as follows:

The Interstate Commerce Commission having prescribed the regulations and standards for the "number, dimension, location and manner of application" of the running boards with which railroad tank cars are to be equipped, pursuant to Title 45, U. S. C., Sections 11 and 12 of the Federal Safety Appliance Act, are such regulations setting forth the "number, dimension, location and manner of application" conclusive as to such appliances, or should this question be left to the determination of the Court or jury?

Statutes and Regulations Involved.

United States Code, Title 45, Sections 11 and 12 are printed in Appendix A and B.

Code of Federal Regulations, Title 49, Transportation, Section 131.8 and Section 131.9 are printed in Appendix C and D.

Statement.

Petitioner's first paragraph of his statement, on page 2, is substantially correct.

Lest there be a misunderstanding as to which appliance broke, we respectfully point out that the dome step board located near the top of the dome of the tank car, used in loading and unloading, was the board involved in the case. The board, running continuously around the car near the bottom, is not involved.

Petitioner stresses the point that the board which broke was sometimes referred to, during the trial, as a "running board" rather than a dome step board. We assume this point was stressed since neither the Federal Safety Appliance Act nor the regulations of the Interstate Commerce Commission refer to a "dome step board".

Title 45, U. S. C., Section 12, provides that "the number, dimension, location and manner of application" of the appliances provided for by Sections 4 and 11 of Title 45 as designated by the Interstate Commerce Commission shall remain as the standards of equipment to be used on all cars subject to the provisions of Sections 1 through 16 of the said title. The Interstate Commerce Commission, under the authority of the Act, has prescribed and established, by regulation, the number and location of the run-

ning boards on tank cars. The code of Federal Regulations, Title 49-Transportation, Section 131.8, provides as follows:

RUNNING BOARDS.

Number:

One (1) continuous running-board around sides and ends; or two (2) running full length on tank, one (1) on each side.

Dimensions:

Minimum width on sides, ten (10) inches.
Minimum width on ends, six (6) inches.

Location:

Continuous around sides and ends of cars. On tank cars having end platforms extending to bolsters, running boards shall extend from center to center of bolsters, one (1) on each side.

Manner of Application:

If side running boards are applied below center of tank, outside edge of running boards shall extend not less than seven (7) inches beyond bulge of tank. The running boards at ends of car shall be not less than six (6) inches from a point vertically above the inside face of knuckle when closed with couplerhorn against the buffer-block, end-sill or back-stop. Running boards shall be securely fastened to tank or tank-bands.

Section 131.9 provides as follows:

RUNNING BOARDS.

Number:

One (1).

Dimensions:

Minimum width on sides, ten (10) inches.
Minimum width on ends, six (6) inches.

Location:

Continuous around sides and ends of tank.

Manner of application:

If running boards are applied below center of tank, outside edge of running board shall extend not less than seven (7) inches beyond bulge of tank. Running boards at ends of car shall be not less than six (6) inches from a point vertically above the inside face of knuckle when closed with coupler-horn against the buffer-block, end-sill or back stop. Running boards shall be securely fastened to tank or tank bands. (Appendix C & D.)

Thus it is crystal clear that the Interstate Commerce Commission has provided for the number and the location of running-boards in accordance with Title 45, U. S. C., Sections 11 and 12. These do not include the dome step board involved in this proceeding.

Argument.

1. Petitioner argues that the Interstate Commerce Commission has not promulgated any regulations pursuant to Title 45, Section 12 of the Federal Safety Appliance Act, designating the number and location of running boards on tank cars. We submit that this is an erroneous assumption. The Interstate Commerce Commission has very definitely designated and provided for the number and location of running boards on tank cars (Sections 131.8 and 131.9, Code of Federal Regulations, Title 49). Nowhere in the Federal Safety Appliance Act, or the Code of Federal Regulations are dome step boards mentioned. The Court of Appeals correctly stated:

> "For it is not every device with which a car might be equipped which comes under, and is governed by the Safety Appliance Act or the regulations adopted by the Interstate Commerce Commission pursuant thereto. Only those are safety appliances which are officially determined by law or regulation to be such."

2. The decision below is clearly in accordance with the latest decisions of the Supreme Court. Petitioner states that the decision of the Court below is in conflict with the case of *Illinois Central Railroad Co.* v. *Williams,* 242 U. S. 462, 61 Law Ed. 437. That case was decided in 1917 and concerned an accident which occurred in 1913. At that time the Interstate Commerce Commission had not acted in setting up any regulations as provided in Section 12, Title 45, U. S. C. The Supreme Court points this out in the case of *A. T. & S. F. Railroad* vs. *Scarlett,* 300 U. S. 471, 81 Law Ed. 748 (1937).

By the time the *Scarlett* case was decided (1937) the Interstate Commerce Commission had acted in providing regulations and standards for the appliance in question in that case. The Supreme Court, in the *Scarlett* case, unequivocally and very definitely points out that once the Interstate Commerce Commission has acted the ruling in the *Williams* case, relied on by the Petitioner here, is obsolete and without legal effect.

The *Williams* case was cited and relied upon by the plaintiff-respondent in the *Scarlett* case, and the Supreme Court disposed of the *Williams* case with the following statement:

> "In Illinois C. R. Co. v. Williams, 242 U. S. 426, 466, 61 Law Ed. 437, 440, 37 S. Ct. 128, we held that Section 2* of the Act requiring secure ladders, etc.,

* Sec. 11, Title 45, U. S. C.

> was operative pending action by the Interstate Commerce Commission under Section 3*. In the interim, we said, Section 2 had the effect of prescribing an absolute and imperative duty, of making the ladders and other appliances 'secure', but that Section 3* contemplated that these appliances shall ultimately conform to a standard to be prescribed by the Interstate Commerce Commission, that is, that they shall be standardized."

The Supreme Court, in the *Scarlett* case, clearly set forth the principle of law governing this case:

> "The regulation having been made by the Commission in pursuance of constitutional statutory authority, it has the same force as though prescribed in terms by the statute. And the railway company having strictly complied with the regulation has discharged its full duty so far as the ladder requirement of the Safety Appliance Act is concerned. *The judgment of the trial Court and jury cannot be substituted for that of the Commission*" (Emphasis supplied).

In 1925, some eight years after the *Williams* case was decided and twelve years before the *Scarlett* case, the Supreme Court held that Congress delegated to the Interstate Commerce Commission sole jurisdiction over "the number, dimensions, location and manner of application of the appliances provided for by Sections 4 and 11 of the Title."

Davis, Director General of Railroads vs. *Manry*, 266 U. S. 401; 69 Law Ed. 350 (1925).

It is crystal clear that the decision of the Court of Appeals follows the law as laid down by this Court in the *Scarlett* case, and is not in conflict with any decision of the Supreme Court.

---

* Sec. 12, Title 45, U. S. C.

3. Petitioner states that the decision below "is believed to be in conflict" with the decision of the Fourth Circuit Court of Appeals in *Davis v. Reynolds*, 280 Fed. 363, cert. denied, 258 U. S. 627 and the decision of the Ninth Circuit Court of Appeals in *Southern Pacific Co. v. Carson*, 169 Fed. 2d 734.

The *Davis* v. *Reynolds* case was decided in 1922. The plaintiff-respondent in the *Scarlett* case, cited the *Davis* v. *Reynolds* case along with the *Williams* case, in support of substantially the same contention that the petitioner here argued before the Court of Appeals and would now have this Court review. We submit that if there is a conflict, as urged by the petitioner, it was resolved by the decision in the *Scarlett* case.

In *Southern Pacific Co.* v. *Carson*, the Ninth Circuit Court of Appeals made this observation:

> "Here, if the facts be given attention as plainly they must, it can not rationally be said that the brake club did not constitute a part of the hand brake. The club was not a contrivance separate and distinct from the brake, nor was it designed or used for a purpose apart from the use of the brake."

Manifestly, the defective brake club was an integral part of the brake which had been prescribed by the Interstate Commerce Commission pursuant to the Safety Appliance Act, 45 U. S. C. Sec. 12. The dome step in this case is not a part of, and is in no way related to the running boards, prescribed, as to number and location, by the Interstate Commerce Commission.

Conclusion.

The Court below was correct in holding that the petitioner, an independent contractor, should pursue his right of action under the common law rules of negligence and not under the Safety Appliance Act.

For the foregoing reasons it is respectfully submitted that this petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Appendix "A".

Statutes Referred To.

Title 45, United States Code.

Section 11: Safety appliances required for each car; when hand brakes may be omitted.

"It shall be unlawful for any common carrier subject to the provisions of Sections 1-16 of this title to haul, or permit to be hauled or used on its line, any car subject to the provisions of said sections not equipped with appliances provided for in sections 11-16 of this title, to-wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the tops of such ladders: PROVIDED, That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose. Apr. 14, 1910, c. 160, 2, 36 Stat. 298."

Appendix "B".

Statutes Referred To

Title 45, United States Code.

Section 12. Safety appliances; as designated by commission, to be standards of equipment; modification of standard height of draw-bars.

"The number, dimensions, location, and manner of application of the appliances provided for by sections 4 and 11 of this title as designated by the Interstate Commerce Commission shall remain as the standards of equipment to be used on all cars subject to the provisions of sections 1-16 of this title, unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause shown; and failure to comply with any such requirement of the Interstate Commerce Commission shall be subject to a like penalty as failure to comply with any requirement of sections 11-16 of this title. Said commission is hereby given authority, after hearing, to modify or change, and to prescribe the standard height of draw-bars and to fix the time within which such modification or change shall become effective and obligatory, and prior to the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard now fixed or the standard so prescribed, and after the time so fixed or the standard so prescribed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard so prescribed by the commission. Apr. 14, 1910, c. 160, 3, 36 Stat. 298."

Appendix "C".

Regulations Adopted by the Interstate Commerce Commission in Pursuance of Sections 11 and 12, Title 45, United States Code.

Section 131.8 (Page 203) Code of Federal Regulations, Title 49—Transportation.

TANK CARS WITHOUT SIDE-SILLS AND TANK CARS WITH SHORT SIDE-SILLS AND END-PLATFORMS.

Hand-Brakes.

Number:

Same as specified for "Box and other house cars."

Dimensions:

Same as specified for "Box and other house cars."

Location:

Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be located on end of car to the left of center.

Manner of Application:

Same as specified for "Box and other house cars."

RUNNING BOARDS

Number:

One (1) continuous running-board around sides and ends; or two (2) running full length on tank, one (1) on each side.

Dimensions:

Minimum width on sides, ten (10) inches.

Minimum width on ends, six (6) inches.

Location:

Continuous around sides and ends of cars. On tank cars having end platforms extending to bolsters, running-boards shall extend from center to center of bolsters, one (1) on each side.

Manner of Application:

If side running-boards are applied below center of tank, outside edge of running-boards shall extend not less than seven (7) inches beyond bulge of tank.

The running-boards at ends of car shall be not less than six (6) inches from a point vertically above the inside face of knuckle when closed with couplerhorn against the buffer-block, end-sill or back-stop.

Running-boards shall be securely fastened to tank or tank-bands.

SIDE-STEPS

Number:

Same as specified for "Box and other house cars."

Dimensions:

Same as specified for "Box and other house cars."

Location:

One (1) near each end on each side under side-hand-hold.

Outside edge of tread of step shall be not more than four (4) inches inside of face of side of car, preferably flush with side of car.

Tread shall be not more than twenty-four (24) preferably not more than twenty-two (22), inches above the top of rail.

Manner of application:

Same as specified for "Box and other house cars."

LADDERS.

(If running-boards are so located as to make ladders necessary)

Number:

Two (2) on cars with continuous running-boards.

Four (4) on cars with side running-boards.

Dimensions:

Minimum clear length of tread, ten (10) inches.

Maximum spacing of treads, nineteen (19) inches.

Hard-wood treads, minimum dimensions, one and one-half (1½) by two (2) inches.

Wrought iron or steel treads, minimum diameter, five-eighths (⅝) of an inch.

Minimum clearance, two (2) preferably two and one-half (2½) inches.

Location:

On cars with continuous running-boards, one (1) at right end of each side.

On cars with side running-boards, one (1) at each end of each running-board.

Manner of application:

Ladders shall be securely fastened with not less than one-half (½) inch bolts or rivets.

SIDE-HANDHOLDS.

Number:

Four (4) or more.

Dimensions:

Same as specified for "Box and other house cars."

Location:

Horizontal: One (1) on face of each side-sill near each end on tank cars with short side-sills, or one (1) attached to top of running-board projecting outward above sill-steps or ladders on tank cars without side-sills. Clearance of outer end of handhold shall be not more than twelve (12) inches from end of car.

If side safety-railings are attached to tank or tank-bands four (4) additional sill vertical handholds shall be applied, one (1) as nearly as possible over each sill-step and securely fastened to tank or tank-band.

Manner of application:

Same as specified for "Box and other house cars."

END HANDHOLDS.

Number:

Four (4).

Dimensions:

Same as specified for "Box and other house cars."

Location:

Horizontal: One (1) near each side of each end of car on face of end-sill. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

Manner of application:

Same as specified for "Box and other house cars."

TANK-HEAD HANDHOLDS.

Number:

Two (2). (Not required if safety-railing runs around ends of tank.)

Dimensions:

Minimum diameter five-eighths (5/8) of an inch, wrought iron or steel.

Minimum clearance two (2), preferably two and one-half (2½) inches.

Location:

Horizontal: One (1) across each head of tank not less than thirty (30) nor more than sixty (60) inches above platform on running-board. Clear length of

handholds shall extend to within six (6) inches of outer diameter of tank at point of application.

Manner of application:

Tank-head handholds shall be securely fastened.

Safety-Railings.

Number:

One (1) running around sides and ends of tank or two (2) running full length of tank.

Dimensions:

Minimum diameter, seven-eighths (⅞) of an inch, wrought iron or steel.

Minimum clearance, two and one-half (2½) inches.

Location:

Running full length of tank, not less than thirty (30) nor more than sixty (60) inches above platform or running-board.

Manner of application:

Safety-railings shall be securely fastened to tank or tank-bands and secured against end shifting.

End-Ladder Clearance.

No part of car above end-sills within thirty (30) inches from side of car, except buffer-block, brake-shaft brackets, brake-wheel, running-boards or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill, and no other part of end of car or fixtures on same, above end-sills, other than exceptions herein noted, shall extend beyond the outer face of buffer-block.

Uncoupling-Levers.

Same as specified for "Box and other house cars."

Appendix "D".

Regulations Adopted by the Interstate Commerce Commission Pursuant to Sections 11 and 12, Title 45, United States Code.

Section 131.9 (Page 205). Code of Federal Regulations, Title 49, —Transportation.

TANK CARS WITHOUT END-SILLS
HAND-BRAKES.

Number:

Same as specified for "Box and other house cars."

Dimensions:

Same as specified for "Box and other house cars."

Location:

Each hand-brake shall be so located that it can be safely operated while car is in motion. The brake-shaft shall be located on end of car to the left of center.

Manner of application:

Same as specified for "Box and other house cars."

BRAKE-STEP.

Same as specified for "Box and other house cars."

RUNNING-BOARDS.

Number:

One (1)

Dimensions:

Minimum width on sides, ten (10) inches.

Minimum width on ends, six (6) inches.

Location:

Continuous around sides and ends of tank.

Manner of application:

If running-boards are applied below center of tank, outside edge of running-board shall extend not less than seven (7) inches beyond bulge of tank.

Running-boards at ends of car shall be not less than six (6) inches from a point vertically above the inside face of knuckle when closed with coupler-horn against the buffer-block, end-sill or back-stop.

Running-boards shall be securely fastened to tank or tank-bands.

SILL-STEPS.

Number:

Four (4). If tank has high running-boards, making ladders necessary, sill-steps must meet ladder requirements.

Dimensions:

Same as specified for "Box and other house cars."

Location:

One (1) near each end on each side, flush with outside edge of running-board as near end of car as practicable.

Tread not more than twenty-four (24) preferably not more than twenty-two (22) inches above the top of rail.

Manner of application:

Steps exceeding eighteen (18) inches in depth shall have an additional tread and be laterally braced.

Sill-step shall be securely fastened with not less than one-half (½) inch bolts with nuts outside (when possible) and riveted over, or with one-half (½) inch rivets.

SIDE-HANDHOLDS.

Number:

Four (4) or more.

Dimensions:

Same as specified for "Box and other house cars."

Location:

Horizontal: One (1) near each end on each side of car over sill-step on running-board, not more than two (2) inches back from outside edge of running-board, projecting downward or outward.

Where such side-handholds are more than eighteen (18) inches from end of car, an additional handhold must be placed near each end on each side not more than thirty (30) inches above center line of coupler.

Clearance of outer end of handhold shall be not more than twelve (12) inches, from end of car.

If safety-railings are on tank, four (4) additional vertical handholds shall be applied, one (1) over each sill-step on tank.

Manner of application:

Same as specified for "Box and other house cars."

END-HANDHOLDS.

Number:

Four (4).

Dimensions:

Same as specified for "Box and other house cars."

Location:

Horizontal: One (1) near each side of each end of car on running-board, not more than two (2) inches back from edge of running-board projecting downward or outward, or on end of tank not more than thirty (30) inches above center line of coupler.

Manner of application:

Same as specified for "Box and other house cars."

SAFETY-RAILINGS.

Number:

One (1).

Dimensions:

Minimum diameter seven-eighths (7/8) of an inch, wrought iron or steel.

Minimum clearance two and one-half (2½) inches.

Location:

Safety-railings shall be continuous around sides and ends of car, not less than thirty (30) nor more than sixty (60) inches above running-board.

Manner of application:

Safety-railings shall be securely fastened to tank or tank-bands, and secured against end shifting.

Uncoupling-Levers.

Number:

Same as specified for "Box and other house cars."

Dimensions:

Same as specified for "Box and other house cars," except that minimum length of uncoupling-lever shall be forty-two (42) inches, measured from center line of end of car to handle of lever.

Location:

Same as specified for "Box and other house cars," except that uncoupling-lever shall be not more than thirty (30) inches above center line of coupler.

End-Ladder Clearance.

No part of car above buffer-block within thirty (30) inches from side of car, except brake-shaft, brake shaft brackets, brake-wheel or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer block or back-stop, and no other part of end of car or fixtures on same, above buffer-block, other than excepts herein noted, shall extend beyond the face of buffer-block.

Appendix "E".

Opinion Below.

Before HUTCHESON, Chief Judge, HOLMES, Circuit Judge, and DAWKINS, District Judge.

HUTCHESON, Chief Judge: This is another case like *O'Donnell* v. *Elgin*, 338 U. S. 384, *Carter* v. *Atlanta*, 338 U. S. 430, and *Affolder* v. *New York, Chicago & St. Louis*, 339 U. S. 596, in which a claimant, for injury resulting from defects in a railroad car, invokes both the absolute liability imposed by the Safety Appliances Act, 45 U. S. C., Secs. 1 to 46, and the qualified liability arising out of negligence. In those cases it was negligence under the Federal Employers Liability Act, 45 U. S. C., Secs. 51 to 60. Here it is negligence at common law.

In those cases, particularly in the *O'Donnell* case, the Supreme Court points to the wide spread confusion attending the anomalous procedure employed in prosecuting such claims.[1] The same difficulties have made themselves felt here with the result that on the appeal of the Atlantic Coast Line Railroad Company, the judgment must be reversed and the cause remanded.

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[1] "Notwithstanding this court's efforts to distinguish the safety appliance violation case from the common-law negligence case, confusion of the two persists, in part, at least, due to the anomalous procedure by which such claims are litigated. * * * The appliance cause often is joined with one for negligence, and even sometimes, as here, mingled in a single mongrel cause of action. In addition, at trial, certain issues such as causation and extent of injury, for example, are common to both causes of action. * * *"

"* * * Pleadings will serve the purpose of sharpening and limiting the issues only if claims based on negligence are set forth separately from those based on violation of the appliance acts.

"But no matter how the pleadings are allowed to stand, we think it is almost indispensable to an intelligible charge to the jury that a clear separation of the two kinds of actions be observed and impressed. * * *" *O'Donnell* v. *Elgin*, 338 U. S. 384.

The matter stands differently, however, on the appeal of plaintiff from the judgment upon a directed verdict as to the Southern Railway Company. For the reasons hereafter stated, as to it this judgment must be affirmed.

Brought against the Atlantic Coast Line Railroad Company, as the delivering, the Southern Railway Company, as the originating, carrier, the suit was for damages for personal injuries received by plaintiff, an independent contractor and invitee, as the result of the breaking when he stepped upon it of a dome step on a tank car which he had been engaged to unload.

Complying with the admonition of the court in the *O'Donnell* case, *supra*, the complaint was in two counts. Count One charged that the dome step was a safety appliance, and that its breaking was a violation of the Appliances Act. Count Two charged that the defendants negligently furnished and tendered, for the unloading of the gasoline therein, a defective tank car.

In addition to a general denial, the Atlantic Coast Line alleged as to the first count, (1) that the dome step was not a safety appliance within the meaning of the act, and (2) that if it was, plaintiff, not being a railroad employee, was not entitled to the benefits of the act.

As to the second count, the charge of common law negligence, it alleged: that the board which gave way had been newly painted; that the defect in it was not a patent but a hidden defect, which could not have been discovered by the use of ordinary care; and that the Atlantic Coast Line, as a delivering carrier, was not as matter of law, and could not be found, guilty of negligence in handling the car.

The Southern Railway alleged: that the Alabama Statute of Limitations of One Year had barred the cause of action as to it, and (2) that it was not the originating carrier, and that it had never had the car in its possession.

On the issues thus joined, the cause was tried to a jury on evidence which included uncontradicted evidence: that the New Orleans and Northeastern Railroad Company was the initial carrier of the car; that the Southern Rail-

way Company had at no time had anything to do with its handling; and that, though the stock of the New Orleans and Northeastern Railroad Company was solely owned by it, Southern Railway Company was an absolutely separate corporation; that it did not operate its subsidiary; and that it had never handled the car.

The district judge, therefore, instructed a verdict for the Southern Railway and submitted the cause to the jury as to the Atlantic Coast Line on both counts and on a general charge.

There followed a general verdict and judgment for $7,500.00 against Atlantic Coast Line from which that defendant has appealed, while plaintiff has appealed from the judgment in favor of the Southern Railway Company.

Here the Atlantic Coast Line insists that it should have had an instructed verdict on both counts, and that the judgment must be reversed and rendered for it. As to the first count, it claims: (1) that the dome step or platform was not a safety appliance; and (2) that if it was, plaintiff may not invoke the benefit of the act. As to the second count, its claim is that the evidence establishes as matter of law: that the defect in the board was not patent but latent; and that defendant had made the usual careful inspection of the car and the defect complained of was not discoverable upon such an inspection.

In the alternative, it urges upon us that if it was not entitled to an instructed verdict throughout, it was certainly entitled to an instruction as to Count One and, finally, that if it was not entitled to an instructed verdict at all, there were errors in the charge and in the refusal of its requested instructions which require a reversal.[2]

[2] Since the error will not again occur, in view of the fact that the safety appliance count has been eliminated, it is sufficient at this time to say that in charging the issues raised by the two counts, the court did not follow the admonition of the Supreme Court in the O'Donnell case to keep the issues of the two counts completely separate and distinct. On more than one occasion he charged in a way which made it extremely difficult if not impossible for the jury to avoid confusion, if not bewilderment, in respect to the completely different concepts of absolute liability under count

We find ourselves in complete agreement with the position taken and the reasons given for that position in the appellant's brief with respect to the first count. This is that, when a railroad company has complied with the regulations prescribed by the Interstate Commerce Commission, pursuant to the authority delegated to it in 45 U. S. C. A., Sec. 11, *et seq.*, it "* * * has discharged its full duty so far as the ladder [or any other safety device] requirement of the Safety Appliances Act is concerned. The judgment of the trial court and jury cannot be substituted for that of the Commission." *A. T. & S. F. RR. Co.* vs. *Scarlett*, 300 U. S. 471; *Apache Ry.* v. *Shumway*, 158 Pac. (2) 142.

We agree with the appellant that the dome step is not, within the classification of the I. C. C., a running board, and that, in assuming, without any basis in law for the assumption, that it was a safety appliance, the court erred. He did correctly declare in his charge that whether it was or was not a safety appliance was to be determined as matter of law and that he did not and would not consider the testimony of any of the witnesses as to whether it was or was not. Without, however, any basis in the statute or in any order or regulation of the Commission for so holding, he did determine as matter of law that it was a safety appliance. So determining, he advised the jury that it was not for it to determine whether it was or was not such, but only whether it was safe, and thus imposed upon the defendant, as to the dome step, the absolute obligation imposed by the statute only with respect to safety appliances. In doing this, he erred.

As appellant correctly points out in the discussion in its brief, a chaotic condition would be produced if the

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one, if the step was unsafe, and conditional liability under the second count, only if its unsafety was the result of negligence.

Further, while the district judge, in the general charge, did endeavor to correctly present the defense which defendants put forward in their special charges numbered 9 to 13, inclusive, we are of the opinion that he did so skimpingly, if at all, and that this failure should be remedied on another trial.

question of compliance with the Safety Appliances Act and the specifications governing the number, location, dimension and manner of appliances should be left to the varying notions of judges or the inexperienced laymen who comprise petit juries. For it is not every device with which a car might be equipped which comes under, and is governed by, the Safety Appliances Act or the regulations adopted by the Interstate Commerce Commission pursuant thereto. Only those are safety appliances which are officially determined by law or regulation to be such. *Central Vermont Railroad* v. *Perry*, 10 F. (2) 132; *Fleming* v. *Richardson*, 24 N. W. (2) 280; *James C. Davis* v. *Maury*, 266 U. S. 401; *Hill* v. *Minneapolis*, 200 N. W. 485.

Nowhere in the regulations adopted by the Interstate Commerce Commission relating to tank cars, as set forth in Secs. 131.8 and 131.9, Title 49 (Transportation) Code of Federal Regulations, or elsewhere, will there be found any reference to a dome step board, by whatever name that device might be labeled.

By its very failure to prescribe any regulation governing such a device, the Interstate Commerce Commission has demonstrated its administrative determination that dome step boards do not fall within the scope of the Act.

A verdict should have been instructed on the first count.

In view of our agreement with appellant that the step is not a safety appliance, it is unnecessary for us to consider and decide whether defendant is right in its second position, that plaintiff, not being a railroad worker, is not entitled to the protection of the Act. It is sufficient to refer to cases pro and con. *Patton* v. *Baltimore*, 197 Fed. 732; *Reisberg* v. *Duluth*, 47 N. W. (2) 113; *Fairport* v. *Meredith*, 292 U. S. 598; *Brady* v. *Terminal*, 303 U. S. 10; *Jacob* v. *Ill.*, 63 So. 306.

As to the second count, we agree with Atlantic's view that if the defect in the board was not discoverable in the exercise of reasonable care, it could not, as delivering carrier, be held negligent for not discovering the undiscoverable.

We cannot agree with it, though, that the evidence established as matter of law that, in the exercise of due care, the defect was undiscoverable. On the contrary, we think there was sufficient evidence to take the second count to the jury.

Because, however, of the submission of the two counts for a general verdict,[3] and because of the errors in the giving and refusal of charges, the judgment may not be affirmed as to Atlantic on the second count.

As to plaintiff's appeal from the judgment for Southern Railway, Southern meets it first with a motion to dismiss because the appeal was not timely. The point made is that, instead of being taken within the time limited from the entry of the judgment in Southern's favor, it was not taken until after the motion of Atlantic for a judgment notwithstanding the verdict and, in the alternative, for a new trial, had been acted upon.

Without laboring the matter by a discussion of them, it is sufficient to say that, under the cases cited by appellant, *Continental* v. *U. S.*, 167 F. (2) 107, a case from this court of *Zimmern* v. *U. S.*, 298 U. S. 167, and the case of *Leishman* v. *Associated*, 318 U. S. 203, the point is not well taken. The appeal was timely. It may not be dismissed.

On the merits, however, we agree with Southern: that, under the undisputed facts, Southern was not the alter ego of the N. O. and N. E. Railway Company; that it was not, and could not be, sued as the original carrier; and that the district judge was right in instructing a verdict in its favor.

No useful purpose will be served by setting out in detail the evidence on which this conclusion is based. It suffices to say that while Southern, as the holding company, has the same general executive officers as its subsidiary, the other employees are not the same. The Southern Railway, as

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[3] The court charged the jury: "You must determine, Gentlemen, whether the plaintiff is entitled to recover under either theory of this complaint. It is not necessary for you to designate in your findings which theory your predicate your findings under, if you find that the plaintiff is entitled to recover under either theory of this case."

such, does not run or operate the N. O. & N. E. Railway Company, and it had nothing to do with the handling of the car in question, as originating carrier or otherwise. A consideration of the cases on which appellant relies for his different view shows that they do not, as applied to the facts of this case, at all support it. This is particularly so with respect to the case on which he mainly relies, *Southern Railway* v. *Crosley*, 201 F. (2) 878, in which the facts were wholly different.

Without setting out the facts of this case, it is sufficient to say that to hold under them that the Southern Railway Company may be sued as the operator of the N. O. and N. E. Railroad Company, and, therefore, the originating carrier, would require a holding in substance that a holding company is responsible simply because it is a holding company, as the actor in the routine, the ordinary, activities of its wholly owned subsidiary in and about the business which the subsidiary was incorporated to, and does, actively own and operate.

The judgment is AFFIRMED as to the Southern Railway Company. It is REVERSED and REMANDED as to the Atlantic Coast Line for further and not inconsistent proceedings.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 150.

W. A. SHIELDS,
Petitioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT.

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BRIEF FOR RESPONDENT.

Question Presented.

Petitioner's brief does not correctly state the question involved. In fact, it may be that the ingenious but inaccurate presentation, in the petition for writ of certiorari, of the question involved influenced the Court to grant the writ.

Petitioner complains that the Court of Appeals held that the dome step board was not a running board (B. p. 4). In the face of that ruling from which he has appealed he persists in presenting the question involved on the assumption that the dome step board is a running board and that the Interstate Commerce Commission was derelict in not so classifying it.

The questions presented here are:

1. Is the dome step board on a tank car a safety appliance under the terms of 45 U. S. C. Section 11,

or the regulations of the Interstate Commerce Commission issued under Section 12 thereof (Secs. 131.8 and 131.9, Title 49, Code of Federal Regulations).

2. Can the petitioner, not an employe of any railroad (admittedly an independent contractor for consignee (B. p. 2)), invoke the protection of the Safety Appliance Act?

Statement.

On May 6, 1952, petitioner, an independent contractor, was instructed by the consignee of a tank car of gasoline to unload the tank car which had been placed on a siding in the freight yards of the respondent, Atlantic Coast Line Railroad Company, in Montgomery, Alabama (R. 24, 25, 117, 118, 130, 131). At the time of his injury petitioner had been engaged in the business of unloading gasoline and related work for about twenty-five years (R. 129). The gasoline in the tank car which petitioner was to unload (SHPX 21336) was released out the bottom of the car by means of a flexible hose (R. 129, 130). But in order for the gasoline to flow out of the tank it was necessary for the dome cap on the top of the car to be removed and a valve inside the dome to be opened (R. 130).

Petitioner went to the top of the tank car, took the dome off, went back to the ground and coupled the hose through which the contents of the car would unload. He then went back up to the dome to show his helper how to open the valve. Frank Watkins, petitioner's helper, stated that both he and petitioner were standing on the dome step board when it broke (R. p. 119, p. 122) and petitioner fell to the ground.

Petitioner went back to the dome again, finished unloading the car and continued to work without interruption or loss of time until July, 1953, more than fourteen months

after the accident (R. p. 142) when he spent five days in the hospital. He claims total lost time of 120 hours at $2.00 an hour and medical expenses of $342.65. X-rays were not taken until twelve months after the accident. The jury verdict was $7,500.00.

The dome step board "looked safe enough" (R. p. 138). It held the weight of petitioner on two trips and held weight of his helper, Watkins, but when both of them stood on the board at the same time it broke. The board looked like it had been painted two or three months before and no defect was apparent. Petitioner climbed over it and stood upon it several times. It was newly painted and looked like a new board (R. p. 242).

Petitioner originally brought this action to recover on allegations of negligence in failing to maintain safe and secure wooden structures around the dome of the tank car. The complaint was later amended to present an additional count, charging violation of the Safety Appliance Act. The District Court submitted the case to the jury for a general verdict on the two counts. The Circuit Court held the rulings of the District Court as to the count involving the Safety Appliance Act were in error, and the verdict being a general one, the case was remanded for trial on the count as to common law negligence upon which count the Court held the evidence to be sufficient to go to the jury (R. p. 341, *et seq.*). There is, of course, no final judgment in the case.

Argument.

Petitioner continues his persistent assumption that the dome step board is a "running board" in his statement of the case (B. pp. 2-4) and in his summary of argument (B. p. 5) declaring "that all running boards (which includes the defective board in this case) are covered by Section 11 of the Safety Appliance Act." This assump-

tion, no matter how oft repeated does not make it so. The Circuit Court said:

> "Nowhere . . . will there be found any reference to a dome step board by whatever name that device might be labeled" (R. p. 248).

The Court will observe that the respondent in its appeal to the Circuit Court specified error not only on the question that the dome step board was not an appliance covered by the Safety Appliance Act but also that petitioner was not entitled to the protection of the Act. The Circuit Court, having held that the dome step board was not covered by the Act, did not pass upon the question as to whether the petitioner could avail himself of its provisions. This point is made here so that both questions will be before the Court. However, in our view of the law this Court, too, will not reach the latter question.

Some tank car builders and owners provide dome steps or platforms for convenience of those loading or unloading cars, with and without railings. Some provide no such facility. None are *required*. Whether there shall be any such facility or device is a matter for the builder or owner to decide, and the type of facility is likewise a matter for their exclusive decision.

The dome step board is not a "running board". Running boards are specifically provided for in the Interstate Commerce Commission's regulations published as Title 49, Code of Federal Regulations, Sections 131.8 and 131.9, with number, dimensions and location and in no instance is a board of any kind required at the dome. The dome step board does not "run" anywhere. It is totally disconnected and disassociated from any other board. It sits apart from all other appliances and is purely for the convenience of those loading or unloading the tank car. It has nothing to do with the safety or movement of the car.

Petitioner relies heavily upon the case of *Illinois Central R.R. Co. v. Williams*, 242 U. S. 462. This case was decided in 1917 and involved an accident which occurred in 1913, at which time the Interstate Commerce Commission had not promulgated any regulations as provided in Section 12. This was clearly pointed out in the case of *ATeSF v. Scarlett*, 300 U. S. 471, decided in 1937, where this Court said:

> "In Illinois C. R. Co. v. Williams, 242 U. S. 462, 466, 61 L. ed. 437, 440, 37 S. Ct. 128, we held that Section 2 of the act requiring secure ladders, etc., was operative pending action by the Interstate Commerce Commission under Section 3. In the interim, we said, Section 2 had the effect of prescribing an absolute and imperative duty, of making the ladders and other appliances 'secure'; but that Section 3 contemplated that these appliances 'shall ultimately conform to a standard to be prescribed by the Interstate Commerce Commission, that is, that they shall be standardized . . .'."

Petitioner also cites *Southern Pacific v. Carson*, 169 F. 2d 734. This case involved the application of handbrakes by a member of the train crew, obviously a matter covered by the Safety Appliance Act. Here we have no question of train or car movement or railroad employe, or safety appliance, merely a loading appliance for convenience of non-railroad employes when the tank car is out of train service on an industrial spur.

Petitioner cites *Swinson v. CStPMdO*, 294 U. S. 529. This case involved a railroad employe using a safety appliance. *Coray v. Southern Pacific*, 335 U. S. 520, likewise cited, involved a railroad employe on a motor car injured by the sudden stopping of a preceding train due to defective air brakes. *Davis v. Reynolds*, 280 F. 363, merely held that whether a sill step was safe or not was a question

for the jury. It is respectfully suggested that none of these cases are in point here.

Respondent does not debate the question that "cars *requiring* secure ladders and secure running boards shall be so equipped"; this is the plain intent of the Act. However, respondent urges that (1) the dome step board is not a running board and (2) even if it was, it is not *required* but is optional with car owners and builders. The Court will note that the tank car in question (SHPX 21336) is owned by the Shippers Car Line Corporation and common carriers regulated by the Interstate Commerce Commission cannot refuse to accept such cars in interstate commerce when equipped as *required* by the Interstate Commerce Commission regulations under the Safety Appliance Act, irrespective of devices to facilitate loading and unloading. Both statements of fact agree that the car is unloaded through a flexible hose attached to an outlet at the bottom of the tank. The process of preparing the tank car for unloading requires work at the top of the car and at the bottom (See testimony of Shields R. pp. 131-132) and the devices incident to such process are not safety appliances. Nor are they *required* by the Act of Congress or any regulation of the Interstate Commerce Commission.

The photograph of the car involved clearly shows a "running board" the full length of the car, with a safety railing above it providing a continuous handhold for railroad employes passing over the running board. The dome step board is above the hand railing and no part of the running board system.

The Circuit Court correctly summarized the law:

> "For it is not every device with which a car might be equipped which comes under, and is governed by the Safety Appliance Act or the regulations adopted by the Interstate Commerce Commission pursuant thereto. Only those are safety appli-

ances which are officially determined by law or regulation to be such."

Central Vermont Ry. Co. v. *Perry*, 10 F. 2d 132, 137;

Fleming v. *Richardson*, 24 N. W. 2d, 280 (Iowa, 1946);

Hill v. *M. St. P. & SS. M. Ry. Co.*, 200 N. W. 485 (Minn. 1924).

In conformity with the Scarlett decision, the court in *Jeffries* v. *Olsen*, 121 F. Supp. 463, 476, relied upon the well known rule that administrative regulations such as those made by the Interstate Commerce Commission have "the force and effect of law", the same as though prescribed in terms by statute. Being penal in their nature, the regulations must be strictly construed. *U. S.* v. *A & P Trucking Corp.*, 113 F. Supp. 549.

Comes now the question as to whether the petitioner can invoke the protection of the Safety Appliance Act:

The Safety Appliance Act does not purport to confer any right of action upon injured employes (or anyone else). It merely makes violation of its prohibitions unlawful. *Urie* v. *Thompson*, 337 U. S. 163. It cannot be regarded as wholly separate from and independent of the Federal Employers' Liability Act. It is supplemental to it, having the purpose and effect of facilitating *employe* recovery. *Urie* v. *Thompson*, 337 U. S. 163.

This case was decided in 1949 and was relied upon by District Judge Modarelli in rendering judgment in the case of *Matusiak* v. *Penn.*, 134 F. Supp. 681 in October 1955, sustaining motion of defendant to dismiss upon the ground that plaintiff failed to show he was an employe of the defendant railroad.

This is the identical situation here, it being admitted that petitioner is not an employe of the defendant rail-

road, or any railroad, but is an independent contractor engaged by the consignee to unload the tank car. See *Stevenson* v. *Lake Terminal R. Co.*, 42 F. 2d 357.

In *Patton* v. *Baltimore and Ohio Railroad Company, et al.*, 197 F. 732 (CA 3, 1952), plaintiff, employed by Duquesne Slag Company while temporarily engaged in repairing a railroad car was injured when the brakes failed due to a hidden or latent defect. The Court of Appeals for the Third Circuit reversed the District Court (99 F. Supp. 455), which had held that a non-railroad employee could invoke the Safety Appliance Act.

A similar situation was involved in *Reisberg* v. *Duluth, Missabe and Iron Railway Co.*, 47 NW 2d 113 (Minn. 1951), certiorari denied 342 U. S. 832, 96 L. ed. 630. Plaintiff, an employee of Zenith Dredge Company, was badly injured as result of an alleged defective hand brake; a safety appliance specifically provided for by the Act, when the brakes failed to prevent a run-away of cars downgrade and a collision with other loaded cars. The court recognized that:

> "The Zenith Dredge Company is, of course, not a common carrier engaged in Interstate Commerce. The Federal Safety Appliance Act does not apply to it. Its liability to its employees for injuries growing out of its operation on an engine and cars over its three mile system of tracks, as well as for other injuries sustained by its employees, is governed by the Workmen's Compensation Act of Minnesota. M. S. A. Sec. 176.10, *et seq.* The primary question to be determined here is whether an employee of the Dredge Company, injured in his line of duty, may recover under the Federal Safety Appliance Act against defendant, the owner of the car, but who was not hauling or permitting to be hauled, or using the car with a claimed defective brake on its line at the time of the accident".

In reliance upon *Paul* v. *D. M. & I. R. Co.*, 96 F. Supp. 578 (D. C., Minn. 1950), the court concluded:

> "In our opinion, it is clear that the Federal Safety Appliance Act has no application to our set of facts".

In denying plaintiff's motion for new trial in the *Paul* case, *supra*, the court ruled that:

> "* * * this Court has no right to extend its (Safety Appliance Act) protection to employees of the quarry company * * *".

In *Brady* v. *Terminal Railroad Association*, 82 L. ed. 615, 303 U. S. 10, this Court held that the employee of one railroad, a car repairer, could invoke the protection of the Safety Appliance Act if injured due to a violation of the Act by another railroad. There, plaintiff was an employee of the Wabash Railroad and a "Railroad Employee" in the language of the statute. This decision, decided long after *Fairport P. & E. R.* v. *Meredith*, *supra*, states that:

> "In the instant case, petitioner in the course of his duty (as a railroad employee) would have occasion to go upon the car and use the grab iron and accordingly the benefits of the statute would extend to him, although he was not employed by the carrier holding the car in use, unless he was outside the scope of the statute because of the special character of his work".

The Court further pointed out that:

> "The carrier still remains subject, by the express terms of the statute, to civil liability for injuries sustained by any railroad employee by reason of the defective equipment".

It will be noted that this Court did *not* say that the carrier remained subject by the express terms of the statute for civil liability for injuries sustained by anyone working about or going upon his business about the cars. Thus, the *Brady* case again limits liability under the statute in such cases to "Railroad Employees", and expressly states that plaintiff would not be entitled to the benefits of the Act "if he was outside the scope of the statute because of the special character of his work".

Conclusion.

1. The board which broke is not a running board.

2. The board which broke is not a safety appliance.

3. The board which broke is not *required*.

4. The Safety Appliance Act is not available to petitioner.

We respectfully submit that the judgment of the Court below was correct.

Respectfully submitted,

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December 19, 1955.

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No. 150

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W. A. SHIELDS, PETITIONER

v.

ATLANTIC COAST LINE RAILROAD COMPANY,
RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF ON BEHALF OF THE INTERSTATE COMMERCE COMMISSION, AMICUS CURIAE

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BRIEF ON BEHALF OF THE INTERSTATE COMMERCE COMMISSION, AMICUS CURIAE

STATEMENT

In granting the writ of certiorari, this Court expressed its readiness to accept any brief which the Interstate Commerce Commission might wish to submit. This brief is filed in response to that expression and supports the Court of Appeals' conclusion that a dome step on a tank car does not fall within the scope of the Safety Appliance Act.

The device involved here is a wooden board or platform measuring 2 inches by 7½ inches by 6 feet (R. 26). It is attached to the tank adjacent

to the dome (Pl. Exs. 1 and 2; R. 131, 139 and 330). Its obvious purpose is convenience in loading and unloading the car, rather than safety in the movement of the car. (R. 249) As we will show below, the devices included within the scope of the Safety Appliance Act are those concerned with the movement of the car. That Act does not apply to devices or appliances which are supplied only for convenience in loading and unloading.

ARGUMENT

I. The dome step board is not a "running board" as that term is used in the Safety Appliance Act

A review of some of the historical background of the Safety Appliance Act is helpful in determining whether a particular device is an appliance within the scope of that Act. The rapid growth of the railroad industry immediately following the War between the States was accompanied by numerous accidents with an appalling loss of life.[1] Those accidents were caused to a large extent by the inadequacy of safety devices employed in the operation of the trains. Air brakes were not in general use. The stopping of trains and the control of their speed were done by the locomotive and by use of hand brakes. On freight trains, this required the operation of hand brakes from the top of moving trains and in all kinds of weather. The coupling device in general

[1] Interstate Commerce Commission Activities 1887–1937, pages 117–120. Safety Appliances on the Railroads, L. S. Coffin, Annals of Iowa, Volume V, No. 8, January 1903.

use was the old link and pin coupler which made it necessary for employees to go between the ends of the cars and operate the coupler by lifting the pin and frequently adjusting the link. This method of operation alone was responsible for many accidents resulting in loss of life or limb.

The excessive number of deaths and injuries to trainmen in coupling and uncoupling cars, and in falling from the top of moving trains while operating hand brakes, resulted in vigorous agitation for the equipment of freight cars with automatic couplers and trains with power brakes. As early as 1871, Senator Charles Sumner of Massachusetts initiated a general investigation of the matter by introducing a resolution providing "that the Committee on Commerce be instructed to consider the expediency of providing by law for the regulation of railroads in the United States, so as to prevent the loss of human life and to promote the safety of passengers."

In his first message to Congress in 1889, President Harrison urged that legislation be enacted to protect railroad employees. He said in part—"It is a reproach to our civilization that any class of American workmen who, in the pursuit of a necessary and useful vocation, be subjected to a peril of life and limb as great as that of a soldier in time of war." He repeated his recommendation on the subject in 1890, 1891 and 1892.[2]

[2] 21 Cong. Rec. 90; *Johnson v. Southern Pacific Co.*, 196 U. S. 1, 19.

The original Safety Appliance Act, enacted in 1893 [3], in general terms required (1) that all locomotives be equipped with power driving-wheel brakes and appliances for operating the train-brake system; (2) that all trains have a sufficient number of power-braked cars so that the engineer could control the speed of the train without the use of hand brakes; (3) that all cars be equipped with automatic couplers; and (4) that all cars be equipped with grab irons or hand holds providing greater security for men coupling and uncoupling cars. The Commission was given authority to fix the standard height for draw bars for freight cars and to determine the date upon which the provisions of the Act should become applicable. In 1896, the Act was amended [4] to exempt therefrom certain logging cars.

The Act was again amended [5] in 1903 (1) to include cars being operated in intrastate traffic, (2) to fix at 50 percent the minimum number of cars in a train required to be equipped with power brakes and (3) to give the Commission authority to increase this percentage from time to time. This amendment also provided that all power-braked cars which were assembled in a train with the minimum percentage of power-braked cars must also have their power brakes in use and operation.

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[3] 27 Stat. 531–532; 45 U. S. C. 1–7.
[4] 29 Stat. 85; 45 U. S. C. 6.
[5] 32 Stat. 943; 45 U. S. C. 8–10.

With the development and greater use of the power brake, it was assumed that the number of injuries from falling from cars would decrease substantially. Thus, in reporting the statistics on this type of accident, the Commission in its 13th Annual Report (1899) stated, at page 55:

> It is believed that the number of killed and injured by falling from trains must be very largely reduced when the train brake comes into general use. The men will not then be obliged to use *the tops of cars for braking, nor to walk on the running boards.* The freight train will be as completely under the control of the engineer as passenger trains are at the present time. The number of killed and injured from this cause is as great as, if not greater than, the number of killed and injured in coupling and uncoupling cars. (Emphasis supplied.)

But the casualty rate continued high and the Commission noted in its 24th Annual Report (1910), at page 41, "an alarming number of accidents to employees by reason of falling from cars."

Even though appliances used by the trainmen riding the cars were not included within the Act, the Commission's inspectors noted their condition and included a report thereon. Thus in its 18th Annual Report (1904), at page 91, the Commission stated:

> In noting defects our inspectors do not confine themselves strictly to those appliances required by law, but include everything which involves the safety of employees such as ladders, steps, running boards on roofs of cars, etc., which are not in themselves required by law, but which are necessary to the safety of the men, and which have been so treated by the Master Car Builders' Association under its standards for the protection of trainmen. * * *

Again in its 21st Annual Report (1907), at page 135, the Commission stated:

> The safety-appliance law should be amended so as to cover all appliances included in the Master Car Builders' standards for the protection of train men. The Commission has long recognized these standards as proper and has endeavored to secure their enforcement. They cover generally sill steps, ladders, roof hand holds, and running boards. These appliances are necessary for the safety of employees; and it is important that they be kept in first-class condition. The Commission's inspectors take note of the condition of these appliances and report upon them, but as there is no penalty attached to their use in a defective condition, they are not always repaired when attention is called to them, whereas the defects covered by the law are, in most cases, promptly repaired. It is hoped that Congress may take action in the matter of legalizing the standards of the

Master Car Builders' Association for the protection of train men.

The recommendations also included the hand brake because "since the general introduction of air brakes the condition of the hand brakes has been sadly neglected." (20th Annual Report (1906), at page 70.)

Pursuant to these recommendations, the Act was amended in 1910[6] to include certain additional safety appliances. Cars were to be equipped with secure sill steps and efficient hand brakes; cars requiring secure ladders and running boards were to be so equipped; and secure hand holds or grab irons were to be installed on the roofs at the tops of such ladders.

This historical background of the Safety Appliance Act reveals quite clearly that the sole concern was over the wholly inadequate safety devices used in the movement of cars and trains. We can find no reference to appliances used in loading and unloading cars. The Act, as amended, includes automatic couplers, grab irons and handholds, air brakes, sill steps, ladders and running boards—all concerned with the movement of the train or car. On a car, the sill step is used

[6] 36 Stat. 298; 45 U. S. C. 11–16.

[7] As the court below points out, the Safety Appliance Act does not include every device with which a car may be equipped. "Only those are safety appliances which are officially determined by law or regulation to be such." 220 F. (2) at 245.

to ride the car or to reach the ladder, the ladder and hand holds are used to reach the running board, and the running board is used to reach the brake—all are directly related to the movement of the car.

This conclusion is further supported by the failure of the Commission to prescribe standards for the many types of devices placed on tank cars to facilitate the loading or unloading thereof.[7]

Experience had indicated a need not only for the safety appliances included in the Act but also for uniformity in such appliances. Thus during the debate on the floor of the House on the bill which eventually was enacted into law, in 1910, a member of the Committee in charge of the bill stated (45 Cong. Rec. 160):

> It is a fact that while the law of 1893 provided for certain grab irons and hand holds on cars, it did not provide for any uniformity of their attachment to the cars. The present law adds to the law of 1893, as amended in 1896 and again in 1903, by providing for safe sill steps and efficient hand brakes. It is a fact that while there has been an effort on the part of railroad organizations and master car-builders' associations to arrive at some kind of uniformity in the equipment of cars with these appliances, up to date they have not been

[7] The Car Builders' Cyclopedia, 19th Edition (1953), at pages 266, 271–279, shows pictures of various types of tank cars with different dome appliances.

able to agree. It is a fact that almost every freight train on almost every road contains cars equipped in several ways, so that the brakeman, switchman, or other employees who have use for these appliances are not able to determine on a dark night or under unusual circumstances just where these attachments are. It is proposed by this bill to authorize the commission, after full hearing, having given all of the carriers and all of the railroad organizations an opportunity to be heard, to determine what is the best method for the equipment of cars. The only amendments to the bill are the ones changing the year, which, of course, ought to be later now, inasmuch as the bill last year did not pass. We have therefore substituted for 1910 the year 1911, and we struck out the provision allowing the commission to alter these arrangements, and simply allowed them permission to grant an extension of the time during which carriers could equip their cars with these various appliances as provided for by the Interstate Commerce Commission. It seems to me, Mr. Speaker and gentlemen, that there can be no question about the necessity for this kind of legislation.

To meet that need, the amendment included a provision that the Interstate Commerce Commission should designate "the number, dimension, location and manner of application" of the appliances specified in that amendment as well as

in Section 4 of the original act, which should remain as the standards of equipment to be used unless changed by the Commission.

Pursuant to that authority, the Commission held hearings in September and October, 1910, and by order dated March 13, 1911, fixed the standards[2] for all appliances specified in section 4 of the original act (that is, "grab irons and handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars"), and Section 2 of the 1910 amendment (that is, sill steps, hand brakes, ladders, running boards, handholds and grab irons) (45 U. S. C. 4 and 11).

Thus it stated in its 25th Annual Report (1911), at page 82:

> The most important acts of the Commission in the administration of the safety-appliance laws during the past year were the promulgation of the orders of March 13, 1911. These orders definitely fixed the standards as to the number, dimensions, location, and manner of application of the appliances required by section 2 of the Act of April 14, 1910, and section 4 of the Act of March 2, 1893, on all equipment placed in service subsequent to July 1, 1911, and

[2] 49 CFR 131. Those standards, with one exception, have remained unchanged to this day. By order dated December 11, 1943, the carriers were authorized to use materials other than wood for running boards used on box and other house cars and foot boards used on steam locomotives in switching service.

extended the period within which all equipment actually in service on July 1, 1911, should be made conformable to its provisions.

The Commission was not niggardly in its administration of the new legislation, as shown by the fact that its order included certain devices not specifically named in Section 2 of the 1910 amendment (45 U. S. C. 11) or in Section 4 of the original law (45 U. S. C. 4). Thus, the Commission's order specified the standard for foot boards on switch engines, for brake steps "if used," and for safety railings on tank cars. The foot board was apparently considered to be the equivalent of a sill step, the brake step a part of the brake, and the safety railing on tank cars a part of the running board.

Conversely, the Commission's regulations do not prescribe the standard for the ladder on the tank car involved in this case extending between the running board and the dome step-board. The justification for not prescribing uniform standards for this ladder is the fact that the Safety Appliance Act does not embrace devices placed upon a car for convenience in loading and unloading.

The standard for every running board on cars included in the Commission's order of March 13, 1911, specifies in effect that they shall run the full length of the car. Thus, these appliances on box and other house cars must be located "full length

of car, center of roof" (49 CFR 131.1 (c) (3)). On tank cars without side-sills and tank cars with short side-sills and end platforms there must be "one (1) continuous running board around sides and ends, or two (2) running full length of tank, one (1) on each side" (49 CFR 131.8 (b) (1)). On tank cars without end-sills the running board must be "continuous around sides and ends of tank" (49 CFR 131.9 (c) (3)).

A running board on a tank car would be of little use to the trainmen "wishing to pass along" [10] while the car was in motion unless some railing was provided. So on all tank cars the Commission also provided for safety railings which should be not less than 30 inches nor more

[10] A running board is defined in Funk & Wagnall's New Standard Dictionary of the English Language, 1946, as follows:

"A footboard on the side of a locomotive, box car, oil car, etc., for the convenience of trainmen or others wishing to pass along."

The term is defined in Car Builders' Cyclopedia, 19th Ed. (1953), as follows:

"Running board. A plane surface, made of boards or a special metal structure, for trainmen to walk or run on. It is placed on the roof of box, stock, refrigerator, caboose and covered hopper cars, and at the sides of tank cars. Gondola, hopper and flat cars usually have none."

It was defined in the 1909 edition as follows:

"Running board. 1. 87, Figs. 262–272, etc. A plane surface, made usually of boards, for trainmen to walk or run on. It is placed on the roof of box or stock cars and at the side of tank cars. Gondola and flat cars usually have none.

"2. (Tank Car.) 119, Figs. 545–549. The only substitute for a car floor."

than 60 inches above the running board or platform (in the case of a car having side platforms) (49 CFR 131.7 (b), 131.8 (h) and 131.9 (g)).

These regulations, while prescribing the standards for certain appliances not specifically named in the Safety Appliance Act, do not mention the dome step or platform or any other device used in the loading or unloading of a tank car.

Since the Commission had been instrumental in obtaining the enactment of the 1910 amendment and had recommended that running boards be included among the appliances which should be and were added to the act, it would seem that the Commission would have made certain that its order setting forth the standards would include any appliance known as a "running board". It is readily apparent, therefore, that the Commission did not construe the term "running board" as used in the 1910 amendment to include a dome step or platform used in loading or unloading a tank car. The Court of Appeals concluded that "By its very failure to prescribe any regulation governing such a device, the Interstate Commerce Commission has demonstrated its administrative determination that dome step boards do not fall within the scope of the Act" (220 F. 2d, at 245). This conclusion was based to some extent, at least, upon the Court's reasoning that—

> * * * a chaotic condition would be produced if the question of compliance with the Safety Appliance Act and the specifi-

> cations governing the number, location, dimension and manner of appliances should be left to the varying notions of judges or the inexperienced laymen who comprise petit juries. For it is not every device with which a car might be equipped which comes under, and is governed by, the Safety Appliance Act or the regulations adopted by the Interstate Commerce Commission pursuant thereto. Only those are safety appliances which are officially determined by law or regulation to be such (citations omitted).

We submit that that conclusion and reasoning is sound and is well founded upon the principle that the conclusions of an administrative body on a subject over which it has jurisdiction is entitled to considerable weight. Moreover, the Commission's interpretation "gains much persuasiveness" from the fact that it was the Commission which recommended the legislation. Cf. *United States* v. *American Trucking Association*, 310 U. S. 534, 549. Surely, if the Commission had deemed such an appliance or the many others not named in the Act nor specified in its order to come within the scope of the Safety Appliance Act, it would have prescribed the standard therefor on at least an "if used" basis as it did in the case of the brake step.

Petitioner bases his argument that the dome step-board is a "running board" within the meaning of the Act almost solely upon several refer-

ences in the record by witnesses and counsel to that appliance as a running board. We believe the answer to this approach to be that the question is one of law and not of fact. As the Trial Court stated (R. 184):

The Court:

> There are a large number of witnesses in this case, and I am anxious to get along with it, and maybe I will save some time by stating that I am going to decide this question by what the Interstate Commerce Act, itself says and the regulations promulgated by the Interstate Commerce Commission under the Act, and the pertinent decisions of any Courts on the question. Not by the oral testimony of what people say they consider it under the Act.

and (R. 193):

The Court:

> I think it is purely a question of law as to whether it is within the scope of a definition of a safety appliance. Overrule.

As we have shown above, the legislative history and historical background of the Safety Appliance Act shows beyond question that the term "running board" means the board used to get from one end of the car to the other end. The dome step board, installed for convenience in loading and unloading, is not a "running board" as that term is used in the Safety Appliance Act.

A new approach to the subject, taken for the first time in this Court, is that the dome step

board may be included in the Commission's order of March 13, 1911. In support of this argument petitioner refers, at page 15 of his brief, to the fact that the Commission's regulations permit running boards to be placed above the center of the tank. However, the dome step, to meet the Commission's requirements as to running boards, would still have to extend the full length of the car, have a width of at least 10 inches, and be accompanied by a safety railing extending the full length of the car and not less than 30 inches nor more than 60 inches above the board.[11] The dome step board does not meet those specifications. Furthermore, it was obviously installed for convenience in loading and unloading.

II. Even if the dome step board were a "running board" it would not come within the scope of the Safety Appliance Act

Assuming arguendo that the dome step board is a running board as petitioner argues and is not included in the Commission's regulations, petitioner still may not prevail under this theory of his case because the Commission, under the law, is the sole judge of what running boards, if any, are *required*. Only *required* running boards come within the scope of the Safety Appliance Act. Thus, Section 11 provides that all cars *requiring* secure running boards shall be so equipped, and

[11] A picture of a tank car having such a running board is shown in Figure 443 on page 347 of the Car Builders' Cyclopedia, 14th Edition (1937).

Section 12 delegates to the Commission the duty of prescribing "the *number*, dimensions, location, and manner of application" of those running boards. The Commission in its order of March 13, 1911, did prescribe, among other things, the number of boards required on the type of tank car involved in this action. The tank car was equipped with the board so prescribed (petitioner's brief at page 15). Authority to specify the number of running boards necessarily carried with it authority to determine what running board, if any, was required on that type of car. Since the Commission determined that one board was required and the car was so equipped, any additional board would not be *required*, and hence not within the scope of the Safety Appliance Act. As this Court stated in *Atchison, T. & S. F. Ry. Co.* v. *Scarlett*, 300 U. S. 471, when a railroad has complied with the regulations laid down by the Commission pursuant to the Safety Appliance Act, it

> * * * has discharged its full duty so far as the ladder (or running board) requirement of the Safety Appliance Act is concerned. The judgment of the trial court and jury cannot be substituted for that of the Commission (citation omitted).

Petitioner argues that the proper approach to the problem here is that used in the *Carson* case.[12] There a yardman was injured when a wooden

[12] *Southern Pacific Co.* v. *Carson*, 169 F. 2d 734.

brake club used to wind the brake staff broke, causing him to fall. Carson sought damages under the language of Section 11 of the Safety Appliance Act requiring an "efficient hand brake." The Commission had prescribed a standard for a hand brake but had made no reference to a brake club. The Court of Appeals affirmed the judgment in favor of Carson, holding that it was properly a jury question to determine whether the brake was "efficient" because of the addition to it of a defective brake club.

In the *Carson* case the law *required* an "efficient hand brake," and it was necessary to determine whether the particular brake used was efficient, especially since it differed from the one prescribed by the Commission. In the instant case, the law does not *require* this so-called running board.

CONCLUSION

The dome step board involved in this case is not an appliance governed by the Safety Appliance Act. Therefore, the court below was correct in holding that petitioner had no cause of action under that Act.

Respectfully submitted.

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